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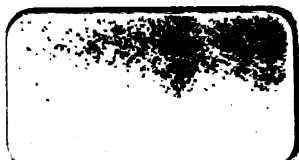
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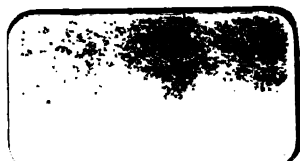
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BEING A
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BY

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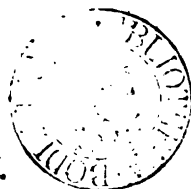
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PREFACE.



THE advantages of the catechetical method of imparting instruction are so universally acknowledged that no apology is needed for the present work ; a few prefatory remarks as to its contents and general object may not, however, be out of place.

It consists of a collection of such questions in the papers set by the Incorporated Law Society at the Final Examinations as are applicable to the law as amended by the Supreme Court of Judicature Act, 1873 ; with the answers carefully collated from the Leading Cases, Text Books, and Acts of Parliament, and also such similar additional questions and answers as the Editors have thought it advisable to add.

Its object is to introduce the Student to his Final Examination, for which it is presumed he has already prepared himself by the careful perusal of those works which form the Articled Clerk's usual course of study. The most fitting introduction to that examination, at which the questions are not selected from any given books, appears to the Editors to be a collection of those hitherto asked.

The questions on Equitable Interests and matters formerly cognizable by the Court of Chancery, follow the order of Smith's "Manual of Equity." Those on Torts and Contracts are not disposed according to the

arrangement of any text-book, but are grouped with reference to the several matters to which they relate ; and those on Property Law are arranged, so far as practicable, in the order in which the subjects are considered in Stephen's Commentaries.

After much consideration, the Editors have, as a rule, omitted the references whence they have taken the answers ; for, although the addition of such references would, no doubt, greatly add to the value of the work, they would also much increase its bulk, and, consequently, its price. A list of the authorities consulted will be found after the Table of Statutes.

As, from experience, it has been found that the incidents of a particular case fix themselves, with the principle involved, upon the memory, when the study of a text-book will fail to convey to the student an accurate idea of the same principle, the Editors have stated briefly the facts of those leading cases which they think may be advantageously used as illustrating general principles.

That their book is far from being so complete or accurate as they wish, the Editors are fully conscious, and as they desire it to be as useful to students as it can be made, they will be glad to receive any suggestions which may tend to increase its value.

H. F. L.

E. A. S.

30, GREAT JAMES STREET, BEDFORD ROW, W.C.

June, 1874.

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Addison on Contracts, 6th edition	Smith's Manual of Equity Jurisprudence, 11th edition
Addison on Wrongs and their Remedies, 4th edition	Smith's Compendium of the Laws of Real and Personal Property, 4th edition
Burton's Compendium of Real Property	Smith's Manual of Common Law, 5th edition
Byle's Law of Bills of Exchange, 11th edition	Smith's Manual of Bankruptcy
Chitty on Contracts, 9th edition	Stephens' Commentaries on the Laws of England, 7th edition
Coote's Treatise on the Law of Mortgage, 3rd edition	Sugden's Treatise on Powers, 8th edition
Daniell's Chancery Practice, 5th edition	Tudor's Leading Cases on Real Property, 2nd edition
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Haynes' Outlines of Equity, 3rd edition	White and Tudor's Leading Cases in Equity, 4th edition
Jacobs' Law Dictionary	Williams on Executors and Administrators, 7th edition
Jarman on Wills, 3rd edition	Williams on Personal Property, 8th edition
Lewin on Trusts, 5th edition	Williams on Real Property, 10th edition
Lynch's Statute Law, 1870-73	Woodfall's Law of Landlord and Tenant, 10th edition
Morgan's Chancery Acts and Orders, 4th edition	
St. Leonard's (Lord) Handybook on Property Law, 8th edition	
Smith's Leading Cases, 6th edition	

ALTHOUGH the operation of the Supreme Court of Judicature Act, 1873, is suspended until November, 1875, the Lord Chancellor intimated in the House of Lords that another Act might be passed early in the ensuing Session, fixing the 1st of May next, or some other early date, for the commencement of the Act. There is therefore still considerable uncertainty as to the date when the provisions of the Act will become Law. Under these circumstances, and having regard to the fact that this work is on theory and principles, and not on practice, the Editors have decided upon publishing it now, instead of waiting until the Act comes into force.

30, GREAT JAMES STREET,
BEDFORD ROW, LONDON, W.C.

Michaelmas Term, 1874.

caused, or was supposed to exist. Those who suffered wrongs in respect of which no appropriate writ existed applied for redress to the King in Council, who referred the matter to his Chancellor. Thence grew up

a practice of applying to the Chancellor directly, who took upon himself to apply an immediate remedy by ordering and compelling the defendant to do what he, the Chancellor, in equity and in conscience thought right that he should do. The origin of equity is matter of history.

State the distinction between law and equity.

The former adjudicates *in rem*, the latter *in personam*.

How may "equity" be defined?

Equity jurisprudence, in the specific and technical sense of the term, as contra-distinguished from natural, abstract, and universal equity, and from law and the statutory jurisprudence of the Court, may be described to be a portion of justice, or natural equity, not embodied in legislative enactments or in the rules of the Common Law, yet modified by a due regard thereto, and to the complex relations and convenience of an artificial state of society, and administered in regard to cases where the particular rights in respect of which relief is sought come within some general class of rights enforced at law, or may be enforced without detriment or inconvenience to the community, but where, as to such particular rights, the Courts of Law could not, or originally did not, clearly afford any relief or adequate relief, at least not without circuitry of action or multiplicity of suits, or could not make such restrictions, adjustments, compensations, qualifications, or conditions as might be necessary, in order

to take due care of the rights of all who are interested in the property in litigation.

What were the three principal cases in which the Court of Chancery granted relief, as stated by Lord Coke?

They were covin, accident, and breach of confidence.

Mention some of the principal heads of the Court's equitable jurisdiction.

Mistake, fraud [actual and constructive], legacies, *donationes mortis causæ* trusts and trustees, specific performance, account, administration, mortgages, apportionment and contribution, partnership, election, satisfaction, partition, injunctions, infants, lunatics, and married women.

What are the peculiar objects of the equitable jurisdiction of the Court? Give, exempli gratiâ, instances under each head.

(1.) *Accident*, as where public stock directed by will to be set apart to answer an annuity is reduced by Act of Parliament, equity will interfere, by decreeing the deficiency to be made up against the residuary legatees, on the ground of accident; (2.) *Fraud*, as where a trustee commits a breach of trust; and (3) *Trust*, as where a use is engrafted on a use, which the Statute of Uses cannot operate upon, but is a mere benefit or trust in equity.

In what cases has the Court no jurisdiction, or declines to exercise it?

The Court has no jurisdiction as to those classes of rights which could not be judicially enforced without

occasioning a greater general mischief or inconvenience than that which results from leaving them to be disposed of *in foro conscientiæ*.

State a few of the general maxims of equity jurisprudence, and explain shortly the meaning of each.

1. "Equity will not suffer a right to be without a remedy." This is the first maxim, and lies at the very foundation of a large proportion of equity jurisprudence. But from the preceding definition of equity jurisprudence, it will be seen that it must be regarded as referring exclusively to rights which come within a class of rights enforced at law, or capable of being judicially enforced, without occasioning a greater detriment to the public than would result from leaving them to be disposed of *in foro conscientiæ*. There are, therefore, some rights capable in themselves of being enforced with propriety, but, in respect of which, neither Common Law nor equity gave any remedy.

2. "Equity follows the law." Thus, in the construction of equitable estates, equity adopts the rules of law applicable to legal estates. So equity will, in all cases, allow the rules of law to govern, and the course of law to proceed, as far as it can, without sacrificing claims grounded on peculiar circumstances, rendering it necessary for equity to interfere.

3. "Vigilantibus non dormientibus æquitas subvenit." The meaning of this is, that equity discountsenances laches, so that although it is a maxim that equity will not suffer a right to be without a remedy

yet equity will refuse to interfere where a party has, for a long and unreasonable time, acquiesced in the assertion of adverse rights.

4. "Where there is equal equity, the law must prevail" (page 6).

5. "Equality is equity, or, equity delighteth in equality" (page 7).

6. "He who comes into equity must come with clean hands." Thus, he who seeks relief on the ground of fraud, must not have been guilty of wilful participation in that fraud.

7. "He who seeks equity must do equity." For instance, equity will not set aside an usurious transaction, except upon the terms that the borrower will pay the lender what is *bond fide* due to him.

8. "Equity looks upon that as done which ought to be done" (page 8).

9. "Qui prior est tempore potior est jure." This maxim applies only where the equities are in all other respects equal. Thus, amongst equitable mortgagees, he who has the prior title has the stronger right.

10. "Equity imputes an intention to fulfil an obligation." Thus, a distributive share under an intestacy is often regarded as a satisfaction of a covenant by the intestate that a relative shall receive a gross sum on his death.

11. "Equity acts *in personam*" (page 8).

What is the rule in equity as to time, barring, or not barring relief against fraud?

Under the old Statute of Limitations equity would grant relief, notwithstanding the time fixed by the statute had expired, where it would have been inequitable to have allowed the statute to be a bar; as where a person perpetrated a fraud, which was not discovered till the statutory bar applied at law. This is an instance of those cases in which equity does not follow the law, the presence of concealed fraud justifying a departure from the maxim. And it is expressly enacted by 3 & 4 Will. IV. c. 27, s. 26, that in every case of concealed fraud the right of the person to bring a suit in equity shall be deemed to have first accrued at the time when such fraud might with reasonable diligence have been first discovered.

Equity is said to follow the law. Does it not sometimes go beyond the law as in the case of trusts executory? What are they?

It does. Trusts executory are trusts raised by a stipulation or direction to make a settlement upon trusts which do not appear to be formally and finally declared by the instrument creating them. Equity endeavours, in construing such trusts, to carry out the presumable intention of the settlor or testator, and may thus be said "to go beyond the law."

Give an instance of the application of the maxim that "Where there is equal equity the law must prevail."

This maxim was applied in the leading case of *Bassett v. Nosworthy*, in which a bill was filed by an

heir-at-law against a person claiming as purchaser from a devisee under the Will of his ancestor to discover a revocation of the Will, and the defendant pleaded that he was a purchaser for valuable consideration *bond fide* without notice of any revocation : the plea was held good, and upon proof of it the bill was dismissed.

Does equality mean equity ? How is this exemplified in the case of a joint purchase ?

It is a maxim that Equality is Equity, or that Equity delighteth in Equality. This is exemplified in the case of a joint purchase, for if two or more purchase an estate, and pay the money in unequal proportions, or if they pay it in equal proportions, but the purchase is for the purpose of some joint undertaking, they will be considered in equity as tenants in common, not as joint tenants (*Lake v. Gibson*, 1 L. C. Eq. 177). Equity always leans strongly against joint tenancy, as it is attended with the right of survivorship, and it is considered more equal for each to have an absolutely equal share, or a share proportionate to the amount of the purchase-money advanced, than for each to have merely an equal chance of having the whole.

What is meant by the equitable doctrine of constructive conversion ?

That money directed to be employed in the purchase of land, and land directed to be turned into money, are in general regarded as that species of property into

which they are directed to be converted. *For equity looks upon that as done which ought to be done.* The leading case on this subject is *Fletcher v. Ashburner*, where real estate having been ordered to be sold it became personalty, and went accordingly (1 L. C. Eq. 741).

Explain the meaning and effect of the maxim that "Equity acts in personam, the law acting in rem."

The meaning of this maxim is that a court of equity always acted primarily *in personam*, and could therefore, where a person against whom relief was sought was within the jurisdiction, make a decree for specific performance wherever the property might be situated. Courts of law, on the other hand, could only adjudicate *in rem*. A good illustration of this maxim is to be found in the case of *Penn v. Lord Baltimore*, where the plaintiff and defendant being in England had entered into articles for settling the boundaries of two provinces in America, Pennsylvania, and Maryland, and the plaintiff sought a specific performance of the articles. The principal objection was that the property was not of the jurisdiction of the Court, and it was decided that the plaintiff was entitled to specific performance of the articles, for, though the Court had no original jurisdiction on the direct question of the original right of the boundaries, the property being abroad, yet that did not at all matter as the suit was founded on the articles and the Court acted *in personam* (2 L. C. Eq. 767).

If the vendor dies before payment of the purchase money, to whom is it payable?

To his personal representatives; for real estate contracted or articted to be sold is considered or reputed as money: and equity considers that as done which is agreed to be done.

What is the meaning of the expression "a conversion out-and-out?"

A conversion "out-and-out" is a conversion so absolute in its terms as to change the nature of the property to all intents and purposes whatsoever, and not merely for the purposes of the will. As where a testator clearly indicates his intention that the produce of the sale of his real estate shall be regarded as personalty, not only for the particular purposes of the will, but also, on the failure of those purposes, as between his real and personal representatives.

What is the law that governs contracts: and as a general rule can a contract that is void by the law of the country where it is made be enforced here?

Contracts are generally construed according to the law of the place in which they were made; and, as a general rule, a contract will not be enforced, unless it is valid both by the law of the country in which it was made and by the law of the country in which it is sought to be enforced.

How may equity jurisprudence be divided?

I. Remedial; II. Executive; III. Adjustive; IV. Protective, irrespective of disability, and V. Protective in

favour of persons under disability. The sixth division, called Auxiliary which was ancillary to the jurisdiction of the Courts of Law, no longer exists in consequence of the provisions of the Supreme Court of Judicature Act, 1873.

What are the general heads of remedial equity?

Accident, mistake, and fraud, which may be either actual or constructive.

ACCIDENT.

In what cases falling under the head of accident is relief afforded in equity?

In such unforeseen and injurious occurrences as are not attributable to mistake, neglect, or misconduct; if it can be granted with full justice, and Courts of Law originally could not afford adequate relief.

What is the relief given in equity against accident?

The relief granted is, putting the parties in the same position as nearly as may be, as they would have been in but for the accident. As, if stock directed by will to be set apart to answer an annuity is reduced by Act of Parliament equity will decree the deficiency to be made up against the residuary legatees. Also, in the case of destroyed, lost, or suppressed deeds; and in certain cases of defective executions of powers, &c.

If an estate be sold for a certain sum of money and an annuity for the life of the vendor, and the vendor

dies before the receipt of any of the annuity, will equity grant his representatives any relief?

It will not, for the vendor's death is not an accident as remediable in equity, but an occurrence which might have been foreseen and provided against.

A. gives a bond to B. to secure payment of a debt. The bond is lost. Has B. any, and what, means to compel the payment of it?

He may compel payment by the same means by which he might if the bond were not lost.

Will the Court relieve against the defective execution of a power, and on what general principles?

In the absence of any countervailing equity, relief will be granted where the defect is not of the very essence of the power, and the defective execution was occasioned by accident and is in favour of a charity, or of purchasers, creditors, or a wife or legitimate child, or an intended husband.

When will equity grant relief in the case of the non-execution of a power?

Only where the power is coupled with a trust, or the non-execution was prevented by fraud. In other cases the Court will not relieve, for it would be interfering with the donee's discretion in regard to the exercise of the power. In *Harding v. Glyn*, the leading case on this subject, a testator by his will gave personal property to his wife, but *did desire her*, at or before her death, to give the same unto and amongst such of his own relations as she should think most

deserving and approved, it was decided that the wife was only intended to take beneficially during her life, and that so much of the property not disposed of in accordance with the power ought to be divided equally amongst such of the relations of the testator as were his next of kin at the time of his wife's death. (2 L. C. Eq. 789.)

MISTAKE.

Define mistake as remediable in equity.

It is an act which would not have been done, or an omission which would not have occurred, but from ignorance, forgetfulness, inadvertence, mental incompetence, surprise, misplaced confidence, or imposition.

What is the distinction adopted by the Court in granting relief under the head of mistake, between a mistake in a matter of law and a mistake in a matter of fact.

Ignorantia facti excusat, ignorantia juris non excusat.

Ignorantia legis non excusat. Does this maxim of law apply to equity? State any one or more instances of cases that occur to you.

This maxim holds good in equity, except in cases of imposition, &c. Thus, where two or more are bound by a bond, and the obligee releases one, supposing, through mistake of law, that the other would remain liable, the obligee will not be relieved.

So if a donee of a power of appointment execute it by deed, without inserting a power of revocation and new appointment, under the mistake that such appointment would be revocable without, he can not obtain relief.

Will the Court relieve against a mistake of a matter of law ?

In regard to such a 'mistake, the maxim, *Ignorantia legis non excusat*, applies, and the Court will not grant relief, except where the mistake is one of title, arising from ignorance of a principle of law of such constant occurrence as to be understood by the community at large ; this gives rise to a presumption that there has been some undue influence, misrepresentation, &c., exercised, so as to entitle the party to relief.

Will equity relieve against acts performed under mistaken notions of fact ?

Ignorantia facti excusat, and relief will be granted when the mistake is unilateral, and the fact was material to the act or contract, and was not doubtful from its own nature, and was a fact which would not be ascertained by such diligence or care as is usual in transactions of the like nature, and of which the other party was under a legal obligation to inform the mistaken person.

Suppose a man to have failed to express what he intended to express by his will, or by a deed, does the Court give effect to the intention if it can be proved ?

Is there any difference between law and equity in such a matter? Explain the difference, if there is any.

As to wills, equity will rectify a *clear* mistake or omission in a will, if it is apparent on the face of the will. But parol evidence is in general inadmissible, except in certain cases of mistake in the name or description of a devisee or legatee. As to deeds, where by mistake an instrument *inter vivos* is not what the parties intended, or there is a mistake in it other than a mistake in law, and the mistake is clearly made out by satisfactory evidence, or is admitted, or is evident from the nature of the case, or from the rest of the deed, equity will rectify the mistake; a voluntary deed can only be reformed with the consent of the donor. At law, parol evidence is inadmissible to disannul, substantially add to, subtract from, qualify or vary a written instrument; but cases of accident, mistake, and fraud are in equity exceptions to this rule.

In cases of mistake in a written instrument does it make any difference in the relief granted whether the defendant is one of the parties to the deed, or his heir, or devisee, or a purchaser from him, with or without notice of the mistake?

Equity only interferes as between the original parties and those claiming under them in priority, as heirs, devisees, creditors, voluntary grantees, purchasers with notice, &c. As against *bond fide* purchasers for value without notice, equity will not relieve, because they have an equal equity.

FRAUD.

Define actual fraud.

It is something said, done, or omitted by a person with the design of perpetrating what he must have known to be positive fraud.

Give some instances in which the Court will set aside a deed or contract, and state the grounds on which the Court acts in such instances.

Equity will set aside a deed or contract when entered into with infants, idiots, lunatics, persons excessively drunk, or under extreme terror, &c., on the ground of actual fraud. It will also set aside contracts in restraint of marriage generally, or in restraint of trade generally, or contracts involving *champerty* or *maintenance*, *post obit bonds* given by expectant heirs and the like, on the ground of constructive fraud, or as being against public policy.

What will amount to fraud in a purchaser in not apprising the vendor of any advantage of which the latter is ignorant?

If he does not disclose any material fact, which the vendor could not be expected to discover by using ordinary care. But, as a general rule, a purchaser is not bound to communicate his knowledge of the value of the property to the vendor; for it is the business of the latter to know, and sufficiently to estimate, the worth of his own property. Thus, if

A, knowing that there is a mine in the land of B., of which he knows B. to be ignorant, should conceal his knowledge of the fact, and enter into a contract to purchase the estate of B. for a price which the estate is worth, without considering the mine, the contract would be good.

In what cases will the Court set aside a sale for inadequacy of price?

Mere inadequacy of price, or any other inequality in the bargain, does not of itself constitute a ground to avoid it. But there may be such an inadequacy as to shock the conscience and amount to conclusive evidence of imposition or undue influence: and gross inadequacy, coupled with other ingredients of a suspicious nature, will furnish the most vehement presumptions of fraud; as if the party injured is not allowed time for deliberation, but is importunately pressed; or, if he is an illiterate person, or of weak understanding.

If A. obtains the conveyance of an estate from B. by fraud, and A. sells the estate to a purchaser, will equity relieve B. and set aside such conveyance and annul the sale to the purchaser? State in what case the Court would or would not do so.

The Court would annul the sale to the purchaser if he had notice, actual or constructive, of the fraud. But it would *not* do so, if the purchaser bought *bonâ fide*, without notice, and for valuable consideration, for "where there is equal equity the law must prevail."

How far is the maxim, Caveat emptor, carried by the Court for specific performance? Does it warrant misrepresentation or artifice in a vendor to procure a contract? State the principles upon which the Court proceeds.

The maxim applies where there has been no misrepresentation or artifice to disguise the thing sold, but the vendor has made use of expressions of praise or affirmations of value, which amount merely to an expression of his own opinion, and not to an assertion, of an independent fact. It by no means warrants any misrepresentation or concealment on his part, and if he misrepresent any material fact so as to mislead the purchaser, or conceal any material fact which, from the nature of the case, he must have known, and which the purchaser could not be expected to discover with ordinary care, the purchaser can obtain relief on the ground of fraud.

Suppose a man to have obtained a legal ownership by fraud, on what principle of jurisdiction, and in what way, does the Court enforce the right of the person defrauded against the fraudulent legal title?

The Court will declare the person who is guilty of the fraud to be a trustee for the person defrauded, and compel him to convey the legal estate to him. On the equitable principle, that equity will not suffer a right to be without remedy, the Court will never allow a person who has obtained the legal estate by fraud to set up his legal title against a superior equitable claim.

Define constructive fraud: and between what parties standing in a fiduciary relation are contracts and gifts liable to be set aside?

Constructive frauds are acts or omissions which operate as virtual frauds on individuals, or if generally permitted would be prejudicial to the public welfare, and are not clearly resolvable into mere accident or mistake, and yet may have been unconnected with any selfish or evil design.

Contracts and gifts between parent and child, guardian and ward, solicitor and client, doctor and patient, trustees and their *cestuis que trustent* are liable to be set aside on the ground of constructive fraud.

How does the Court look on a transaction between father and son just of age, or just after he has come of age, on a consideration of love and affection?

The Court looks upon such a transaction with a considerable amount of jealousy, and will require the father to show that the child was really a free agent, and had adequate and independent advice.

What does the Court usually require to establish the validity of a purchase from an expectant heir?

The purchaser must show either (1) that a full consideration was paid, or (2) that the bargain was fully made known to and approved by the person to whose estate the expectant heir hoped to succeed. This *onus prolati* has been in no degree altered by the Act as to sales of reversions (31 Vict. c. 4), for it is

carefully limited to purchases "made *bond fide* without fraud or unfair dealing," and leaves undervalue still a material element in cases in which it is not the sole equitable ground for relief (*Aylesford v. Morris*, L. R. 8 Ch. 484; 28 L. J. 541; 42 L. J. Ch. 546; 21 W. R. 424).

When is a settlement said to be a fraud on the husband's marital rights?

Where a woman in contemplation of marriage without the privity of her intended husband, makes a settlement to her separate use, or a conveyance in favour of persons for whom she is under no moral obligation to provide, it is a fraud on the husband's marital rights, and will be set aside in equity.

Lady Strathmore, during her engagement with Mr. Grey, conveyed and assigned her property to trustees for her separate use, with his approbation. Afterwards hearing that another gentleman, a Mr. Bowes, had fought a duel on her account, she married him, and he had no notice of the settlement.

In the leading case of *Strathmore v. Bowes*, this settlement was established, for it was made by Lady Strathmore with the consent of Grey, her then intended husband, and not during the course of a treaty for marriage with Bowes, whom she afterwards married, and it was, therefore, not a fraud upon him (1 L. C. Eq. 325).

Pending the treaty for a marriage, can the lady and gentleman alienate their respective properties without the consent of the other?

The lady cannot do so, as such an alienation by her is, as above stated, a fraud on her husband's marital rights. But the same reasons do not apply with equal force to a conveyance made under similar circumstances by the intended husband, as it can hardly be presumed that the marriage was contracted by the wife in expectation of becoming entitled to dower. The intended husband can therefore alienate his estate.

A. makes a voluntary settlement of his estate and then enters into an agreement for value to sell it : will equity compel specific performance of the agreement ?

Specific performance will be compelled at the suit of the purchaser : but equity will not give its aid to a voluntary settler to enable him to complete a contract for sale against a purchaser.

When is a conveyance of property deemed fraudulent as against creditors or purchasers, and what is the effect of such a conveyance as respects the party making it ?

In consequence of 13 Eliz. c. 5, conveyances made with an actual intent to defraud creditors, even if made for valuable consideration to a purchaser with notice, and also voluntary conveyances or assignments of any real or personal property which is liable to the payment of debts, are void as against creditors. And under 27 Eliz. c. 4, voluntary conveyances are void as against subsequent purchasers for value, whether with or without notice ; as between the parties themselves, however, such conveyances are good.

Are there any and what cases of fraud against which equity will not relieve? Suppose the parties are in pari delicto, what maxim guides the Court?

Fraud as a general rule is always a ground for relief in equity, but relief will not be granted in favour of a person who has been guilty of wilful participation in the fraud (unless the fraud is against public policy, and public policy would be defeated by allowing it to stand), for "he who comes into equity must come with clean hands." It is also a maxim of law, not opposed to any equity, that *in pari delicto melior est conditio possidentis*.

If a donee of a general power of appointment over a fund exercises the power, can his creditors claim the fund against the appointee and purchasers from him?

If the donee of a general power appoint in favour of a stranger, such appointment (unless made *bona fide* and for value) will be deemed a fraud upon his creditors, who will in equity become entitled to the money in the hands of the appointee. A purchaser from the appointee will be in no better condition, unless he purchased without notice and for valuable consideration.

In the case of voluntary gift by deed inter vivos, upon whom, if the gift be afterwards challenged by the donor, will the burden of proof fall, and what must be shown to set the deed aside? State the rule.

The burden of proving the transaction to be fair

falls on the person taking the benefit. Proof that the donor knew and understood what he was doing, shows such fairness : unless the donor stood in a confidential relation towards the donee, for then further proof of how the intention was produced must be given. If proper proof be not given equity will set aside the gift on the principle of public policy. In *Huguenin v. Baseley*, Mrs. Huguenin, the plaintiff, whilst a widow, constituted the defendant her agent, and he undertook the management of her property and affairs : and she afterwards executed a voluntary settlement in favour of him and his family. Mrs. Huguenin having now married, this suit was brought by her and her husband for the purpose of setting aside the settlement ; and it was decided that the settlement should be set aside as obtained by undue influence and abused confidence in the defendant as an agent undertaking the management of her affairs, upon the principles of public policy and utility applicable to the relation of guardian and ward (2 L. C. Eq. 462).

Between what relations does the rule apply, and against whom principally does the Court seek to protect the owner of the property ?

The rule applies between parent and child, guardian and ward, trustee and *cestui que trust*, attorney and client, &c. The Court protects the owner of the property against those having an influence over him.

State some cases in which a party, not having actual notice, will be held to have constructive notice,

so as to affect him in a court of equity, the same as if he had received actual notice.

In equity, notice to the agent is notice to the principal, since it would be a breach of trust in the former not to communicate the knowledge to the latter. And whatever is sufficient to put a party upon inquiry is, in equity, held to be good notice to bind him. Thus, notice of a lease will be notice of its contents. In *Le Neve v. Le Neve*, lands in Middlesex were settled by a deed which was not registered. Many years afterwards, they were settled on a second marriage, and that settlement was duly registered, but the agent of the person taking the lands under the second settlement had notice of the first; it was decided that the object of the Register Act being only to secure subsequent purchasers and mortgagees against *prior secret conveyances* and fraudulent conveyances, the former settlement should *be preferred* because of the notice, and that notice to an agent or trustee is notice to the principal (2 L. C. Eq. 23).

Will a party, who has attested the execution of a deed, be held by a court of equity, from that circumstance, to be affected with notice of the contents of such deed?

The mere fact of attesting the execution of a deed will not fix the witness with notice of its contents. (Dart, V. & P. 799.)

In construction of the Registry Acts of Anne and Geo. 2, whereby a registered deed takes priority of one

unregistered, what relief will a court of equity afford; if the party knew of the unregistered deed?

His title will be postponed and made subservient to the title of the party whose deed is not registered; for the object of the Registry Acts is only to secure subsequent purchasers and mortgagees against prior secret conveyances and incumbrances, as decided in *Le Neve v. Le Neve*.

State what contracts and conditions in restraint of trade are void, and in what cases such contracts and conditions may be enforced.

Those in general restraint of trade are void, as tending to discourage industry, enterprise, and just competition. But a person may, for reasonable consideration, restrain himself from carrying on a trade in a particular place, or with particular persons, or for a reasonably limited time. So a person may lawfully sell a secret in his trade or business, and restrict himself from using the secret. The defendant, in *Mitchell v. Reynolds*, had assigned to the plaintiff a bakehouse and had executed a bond not to carry on the trade within the parish for a period of five years under a penalty of £50. The action was brought on the bond, and the defendant pleaded that it was void at law; but it was held to be good, as it only restrained the defendant from trading in a particular place, and was on a reasonable consideration; but it would have been otherwise if, on no reasonable consideration, or to restrain a man from trading at all (1 Sm. L. C. 356).

A., supposing he has a right so to do, enters into a written agreement for sale of an estate to B., which estate belongs to C., can B., under any circumstances, obtain specific performance against A. and C.?

Only if C. were aware of the sale, and permits A. to enter into the contract; for where a person, knowing himself to be the owner of property, permits another to sell it as his own to a third person, who purchases under the supposition that the vendor has a good title, the real owner will not be allowed to assert his title to it.

LEGACIES AND DONATIONES MORTIS CAUSA.

What is the equitable principle upon which a legatee is entitled to proceed against an executor?

That he is a kind of trustee for the legatee, and this forms a universal ground of equitable interference; and because the interposition of the Court may be required to obtain a discovery, account, or distribution of assets.

If a legacy is left to a person for a particular purpose, which cannot be effected, what will become of the legacy?

The fact that it cannot be effected will not prevent the legacy from vesting in the donee. So that if a bequest be to, or in trust for, a legatee to apprentice him, or the like, it is an absolute gift to the legatee;

and if he dies before it is so applied, it belongs to his representatives.

Where a legacy is charged on real and personal estate, and the legatee dies before the day of payment, how is the legacy treated?

If the legacy is made payable on an event *personal* to the legatee (for instance, on his attaining twenty-one), and he dies before that event happens, the legacy is not to be raised out of the land, as it is presumed that testator intended the legatee to have it only on the happening of the event. But if it is made payable on some event not referable to the person of the legatee, but to the circumstances of the estate out of which it is to be paid (for instance, after the decease of a prior tenant for life of the estate), the legacy is vested, and must be raised, notwithstanding the legatee's death, for it is presumed that testator intended the legatee to have it at all events, and merely postponed the payment for the convenience of the estate.

Is a pecuniary legatee entitled to interest, and, if so, from what time, and at what rate, where no time or rate is mentioned in the will?

He is, from a year after the death, at the rate of £4 per cent. per annum.

In what cases will the Court allow interest on a legacy, payable at a future time, when interest is not given by the will?

Where the testator was the parent of, or stood in

loco parentis to the legatee, and there is no other provision for maintenance, even though the legacy be contingent. And when the legacy is to be paid at twenty-one, or on marriage, and the age is attained, or the marriage takes place, in the testator's lifetime, the legacy will be payable at his decease, and carry interest from that period.

From what time does the interest of a legacy given by a parent to his child commence?

The child has a right to the interest of the money from the testator's death.

Define the principles which guide the Court in the construction of wills and legacies.

In deciding on the validity and interpretation of purely personal bequests the Court implicitly follows the rules of the Civil Law as formerly recognised in the ecclesiastical courts, but as to the validity of devises and legacies charged on land it generally follows the rules of the Common Law, and as far as possible it is guided by and endeavours to carry out the intention of the testator.

Define a donatio mortis causa, and state in what particulars it differs from, and in what it resembles, a legacy.

A *donatio mortis causa* is a gift of personal property made by one who is in peril of death, evidenced by a manual delivery of the property itself, or the means of obtaining possession of it, and conditioned to take effect in the event of the donor not recovering from

his existing disorder, and not revoking the gift before his death.

It differs from a legacy in (1), taking effect *sub modo* from the delivery in the donor's lifetime, and being therefore incapable of proof as a testamentary act in the Probate Court, and (2), requiring no assent of the executor or administrator to perfect the donee's title. It differs from a gift *inter vivos*, and resembles a legacy in (1), being revocable during the donor's lifetime; (2), being capable of being made to the wife of the donor; (3), being liable for the donor's debts on a deficiency of assets; and (4), being subject to legacy duty.

EXPRESS TRUSTS.

Define a trust.

A trust, when used in the sense of an equitable interest, is a beneficial interest in, or ownership of, real or personal estate, unattended with the possessory and legal ownership.

A man may be owner of a thing in equity when another man is owner at law. What is the meaning of the equitable ownership; how does it operate, and how does the Court give effect to it?

The meaning of a man having the equitable ownership of a thing is, that he has the beneficial interest therein without being entitled to the possessory or actual ownership thereof. This is in fact identical

with a trust as before defined, and is such an interest as was formerly recognised by the Court of Chancery alone. Now by the S. C. J. Act, 1873, it is enacted that the Court shall take notice of all equitable estates and rights in the same manner as the Court of Chancery recognised them, and shall have the same jurisdiction as the Court of Chancery had for enforcing equitable rights. The Court, therefore, though it will still recognise the legal right of the trustee to the possession and receipt of the rents and profits of the estate will also assert its equitable jurisdiction, and by acting *in personam*, compel him to perform his trust, and account to his *cestui que trust*, who is the equitable owner, for everything he receives by virtue of such legal possession.

State the different kinds of trusts and in what respects the legal differs from the equitable interest in the subject matter of the trust.

Trusts may be divided into three kinds: *express*, *implied*, and *constructive*. For the answer to the latter part of the question see last answer.

How far will the Court construe words of recommendation or request as creating a trust by implication?

Words of recommendation or request will create a trust, provided (1) that the object and the property which is to form the subject of the supposed trusts are certain and definite, and (2) that it appears, from the whole context of the will, the conduct of the

testator, the situation of the parties, and the probable intent, that the words were intended to be *imperative*. Thus, in *Harding v. Glyn*, a testator gave personal property to his wife, but *did desire her*, at or before her death, to give the same amongst such of his own relations as she should think most deserving; and it was held that the wife took beneficially for her life only, and that so much of the property as was not disposed of, according to the power, ought to be divided equally amongst such of the relations of the testator as were his next of kin at his wife's death (2 L. C. Eq. 946).

If a testator devises real estate to A., and by an unattested writing communicated to A., after the testator's death, informs A. that the testator had made the devise in full confidence that A. would devote the real estate to charitable uses, will a court of equity permit A. to retain the estate for his own use?

This will depend on the question whether or not, so far as appears on the face of the will, A. is intended to take the beneficial estate. If it does so appear, A. may retain the estate to his own use, for the estate being well devised by the will, the informal declaration of trust not communicated to A. in the lifetime of the testator will be inadmissible in evidence to prove a trust. If it does not so appear, but the testator devised the estate to A. in such language as to pass the legal estate and not the equitable, in fact, stamps A. with the character of trustee, though

not defining the particular trusts, in this case also the informal declaration will be inadmissible to prove what were the trusts intended. A., however, will not be entitled to retain the beneficial interest himself, but, while the legal estate passes to him, the equitable will result to the heir at law, or residuary devisee, if one.

Define trusts executed and trusts executory, and state if there is any, and what, difference in their construction.

Trusts executed are those which are formally and finally declared by the instrument creating them. A trust executory is one raised by a stipulation or direction to make a settlement upon trusts which are indicated in, but do not appear to be formally and finally declared by the instrument containing such stipulation.

In the case of trusts executed, equity puts the same construction on technical words as that which is put by law on limitations of legal estates. In the case of trusts executory, equity considers the apparent intent to be collected from the whole instrument rather than the strict import of technical terms. Thus in the case of *Lord Glenorchy v. Bosville*, testator devised real estates to trustees upon trust, upon the happening of the marriage of his granddaughter, A. P., to convey the said estates with all convenient speed to the use of the said A. P. for life, remainder to her husband for life, remainder to the issue of her body, with remainders over; and it was held that though A. P. would have

taken an estate tail had it been the case of an immediate devisee, yet, that the trust being executory, it was to be executed in a more careful and accurate manner, and that a conveyance to A. P. for life, remainder to her husband for life, with remainder to their first and every other son, with remainder to the daughters would best serve the testator's interest (1 L. C. Eq. 1).

What trusts will equity enforce, and what trusts will it not enforce?

Equity will enforce a trust where it is executed, or where it is raised by will, although it be a voluntary trust; but it will not enforce a mere voluntary executory trust raised by a covenant or agreement unless for valuable consideration. Thus, it was decided in *Ellison v. Ellison*, that the assistance of the Court cannot be had without consideration, to constitute a party *cestui que trust*, as upon a voluntary covenant to transfer stock; but if the legal conveyance is *actually made* constituting the relation of trustee and *cestui que trust*, as if the stock is actually transferred, though without consideration, the equitable interest will be enforced (1 L. C., Eq. 223.)

State some cases in which courts of equity will support a voluntary conveyance; and in what cases the Court will set such a conveyance aside, and when will the Court refuse to interfere?

If the conveyance is complete, so that no act remains to be done to give full effect to the title, equity will

enforce it throughout against the party making it, and his representatives, although it be merely voluntary. But the Court will not enforce any imperfect gift *inter vivos*, or any executory trust raised by a covenant or agreement, or defective or imperfect conveyance, unless it is founded on valuable consideration (see *Ellison v. Ellison*). The Court will set aside a voluntary gift, if the person to whom it is made is unable to establish that the gift was made voluntarily and deliberately, and with full knowledge of its effect; and if there is any relation between the donor and donee, the gift will be avoided, however unimpeachable the transaction would have been if no such confidence had existed (see *Huguenin v. Baseley*, 2 L. C. Eq. 556). So, also, voluntary conveyances are void against creditors and purchasers, and will be set aside. But the Court will not interfere where the voluntary grantee has conveyed to a *bond fide* purchaser for valuable consideration, before the *bond fide* purchaser from the voluntary grantor acquired his title, nor between two voluntary grantees, where each conveyance was *bond fide*.

If a man conveys an estate to trustees upon trust to sell, and pay his debts, will the Court, at the instance of a creditor, compel the performance of the trust?

A trust created in favour of creditors is, to a certain extent, an exception to the general rule above stated, that the Court will enforce a trust when it is

executed, even in favour of volunteers; for it has been repeatedly held, that a legal transfer of property to trustees for the payment of the debts of the owner, without the knowledge or concurrence of the creditors, does not invest creditors with the character of *cestuis que trustent*, but amounts merely to a direction to the trustees as to the method in which they are to apply the property for the benefit of the *owner*, who alone is regarded as the *cestui que trust*, and can vary or revoke the trusts at pleasure. The Court, therefore, will not, at the instance of the creditors, who are looked upon as mere strangers, compel the performance of the trust. But where the trust has been in any way acted upon, or has been communicated to the creditors, it can no longer be revoked by the settlor.

In the absence of the usual receipt clause, when can a purchaser now pay his purchase money without being bound to see to its application?

A purchaser is not bound to see to the application of his purchase money when he makes the payment *bond fide*, unless the contrary is expressly declared by the instrument creating the trust; for it is enacted by 22 & 23 Vict. c. 35, that the receipt of any person to whom any purchase money is payable upon any trust shall effectually discharge the purchaser paying the same.

Will equity recognise any period of time as a limitation to a suit against a trustee who is charged with

fraud in the execution of his trust; and is there practically any, and what distinction to the rule?

As long as the relation of trustee and *cestui que trust* is acknowledged to exist, lapse of time can constitute no bar to proper relief for the *cestui que trust*. But where this relation no longer exists, and time or long acquiescence have obscured the nature of the trust, the Court will refuse relief, upon the ground of lapse of time and inability to do complete justice.

IMPLIED TRUSTS.

What is an implied trust?

An implied trust is a trust founded on an unexpressed but presumable intention.

What is a resulting trust? Give an instance.

A resulting trust is one that *results* or returns for the benefit of the settlor or his representatives; for instance, where property is given upon trust, and the trusts fail by reason of the failure of the objects or purposes, or of the illegality or indefinite nature, of the trusts, there is a resulting trust of such property to the person creating the trust, or to his heir or legal representatives.

When property is given upon trusts which fail, either in the whole or partially, by deaths, or by illegality, or indefiniteness of the trusts themselves, or when they are finally fulfilled without exhausting the

property, to whom does the resulting trust of such remaining property belong?

There is a resulting trust of such property, or of so much thereof as remains unexhausted, to the person creating the trust, or to his heir or legal personal representatives, unless there is sufficient evidence or presumption of a contrary intention.

Where a conveyance or transfer of property, real or personal, is made without consideration, but upon trust of which no distinct use or trust is stated, to whom will the implied trust devolve?

There is in this case also a resulting trust to the settlor or his representatives, real or personal, according to the nature of the property.

Land is directed to be sold, money is directed to be laid out in land. How does this affect the devolution of the properties and when does the conversion take place?

Under the equitable doctrine of conversion stated above, the land is regarded as money, and the money as land; the former therefore will devolve as personal, the latter as real estate. This conversion takes place from the date of the deed directing the conversion, or in the case of a will from the death of the testator.

Devise of land in trust for sale to pay debts. After the payment of the debts in full there is a surplus. Who is entitled to it?

The heir-at-law of the testator is entitled to the surplus. For where real estate is directed to be sold for

certain purposes, so much of the estate or the produce thereof as is not effectually disposed of by the will results to the heir.

This is not a conversion "out-and-out" as explained above, but only for a limited purpose.

If money is directed by a testator to be laid out in land for particular purposes, and these purposes should fail of taking effect, does it belong to the heir or next of kin?

Where money is bequeathed to be laid out in land, the same principle applies as where land is directed to be converted into money: the conversion will operate only so far as the will disposes of the land into which it is to be converted: therefore on the failure of the purposes of the conversion, the produce of the fund, or the fund itself, will result to the next of kin.

A. purchases and pays for a freehold estate, which is conveyed by the vendor to B. C. purchases and pays for Government stock, which is transferred into the name of D. Is there a resulting trust in both or either of these cases in favour of A. or C. upon simple proof of the payment of the purchase money by him?

There is a resulting trust of the freehold estate in favour of A., and also of the stock in favour of C. For as decided in the case of *Dyer v. Dyer*, "the clear result of all the cases, without a single exception is, that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others jointly, or in the names of

others without that of the purchaser, whether in one name or several, whether jointly or *successive*, results to the man who advances the purchase-money." And this doctrine applies to personalty as well as realty, as in the case of purchase of stock in the name of a stranger. If the advance of the purchase-money by the real purchaser does not appear on the deed, or even if stated to have been made by the nominal purchaser, parol evidence is admissible to prove by whom it was actually made. And this notwithstanding the Statute of Frauds which requires declarations of trust of freehold to be in writing, for this is a trust resulting by operation of law, and trusts of that nature are expressly excepted from the statute (1 L. C. Eq. 165).

A purchases an estate and takes a conveyance of it in the name of C, his son. Is there a resulting trust to A ?

Where a purchase is made by a parent in the name of a child there will *prima facie* be no resulting trust for the parent, but on the contrary a presumption arises that an advancement was intended. This was clearly laid down in *Dyer v. Dyer*, where copyholds being granted to A. and B. his wife, and C. his younger son, to take in succession for their lives and the life of the survivor, and the purchase money being all paid by A. it was held that C. was not a trustee of his life interest for A. but took it beneficially as an advancement from his father.

CONSTRUCTIVE TRUSTS.

Define a constructive trust as distinguished from express or implied trusts, and state some of the instances in which it arises.

It is one raised by construction of equity, in order to satisfy the demands of justice without reference to any intention of the parties. Thus, where a person who is only joint owner acting *bonâ fide* permanently benefits an estate by repairs or improvements, a trust may arise in his favour in respect of the sum expended. So where a person lawfully in possession under a defective title has made permanent improvements, if relief is asked by the true owner, equity will compel him to allow for such improvements, for he who seeks equity must do equity.

What lien has a vendor on the estate after conveyance for his unpaid purchase-money, and how is such lien affected if the vendor take a separate security for such unpaid purchase-money?

This is an instance of a constructive trust: the vendor has a lien on the property in equity: that is, a hold upon it for the satisfaction of the purchase money; and, to the extent of the lien, the purchaser becomes a trustee for the vendor. The mere taking of a security is not a waiver of the lien, but according to the circumstance of each case and the nature of the security it may be evidence of relinquishment, the

proof, however, being upon the purchaser. As a general rule the taking of a mere personal security will not be an abandonment of the lien, though if the vendor take a totally distinct and independent security the lien is lost (*Mackreth v. Symmons*, 1 L. C. Eq. 263).

If a trustee of renewable leaseholds renews the lease in his own name and for his own benefit, what view of the transaction will the Court take when the matter comes before it?

He will be considered a trustee of such renewed interest for his *cestui que trust*, even though the lessor may have refused to grant a renewal to the *cestui que trust*. So in the case of *Keech v. Sandford*, which is the leading case on the doctrine of constructive trusts, the lease of Romford Market had been bequeathed to B. in trust for an infant. B., before the expiration of the term applied to the lessor for a renewal of the lease for the benefit of the infant, and this was refused. B. then got a lease made to himself, and on this suit being brought by the infant to have the lease assigned to him it was decided that B. was a trustee of the lease for the infant, and must assign the same to him (1 L. C. Eq. 39).

TRUSTEES, EXECUTORS, AND PERSONS STANDING IN A
FIDUCIARY POSITION.

When a trustee who has been appointed by deed and

has accepted the trust refuses to act, what is the proper course to be pursued to obtain an execution of the trust?

Application should be made to the Court to compel the trustee to perform the trust: and this the Court will oblige him to do, for a trustee having accepted the trust cannot without the consent of the *cestui que trust* or of the Court denude himself of the character of trustee, till he has performed the trust.

Explain the meaning of the maxim that equity will not allow a trust to fail for want of a trustee. Give an instance of its application.

Whenever a perfect trust, or even an imperfect trust if supported by a valuable consideration, has once attached and is not extinguished by the countervailing equity of a *bond fide* purchaser for valuable consideration without notice, or other person having conflicting equity, nor has otherwise ceased to exist, the Court will follow the legal estate and decree the person in whom it is vested to execute the trust.

For instance, if the individuals named as trustees fail, whether by death, incapacity, or refusal to act the Court will provide a trustee: and if no trustees are appointed at all, the Court assumes the office in the first instance.

Are trustees, as such, entitled to any, and what, allowance for expenses or loss of time, or either of them?

They are not allowed any remuneration for their services without some provision for that purpose, but

they are entitled without any express provision to defray out of the trust-funds expenses legitimately and properly incurred.

When a trustee invests part of the trust property on a security not within his authority and makes a profit, and in other like investments sustains a loss, how is the account to be taken?

Against the trustee; that is to say, he will have to account for all the interest which he ought to have made, and would have made, by the investment of the property on proper security: and he will also be accountable for any gains beyond the amount of such interest as above mentioned, which he has actually made with the trust property. He will not be allowed to set off the profit against the loss.

State the principle upon which the Statute of Limitations cannot be pleaded by a trustee in bar to the claim of his cestui que trust.

Time will not run against an express trust: and by the S. C. J. Act, 1873, it is expressly enacted that no claim of a *cestui que trust* against his trustee for any property held on an express trust or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations (s. 25).

Trustees of a settlement, made previous to the marriage of John with Sarah, have power to sell real estate, with the consent of John and Sarah, during their joint lives, or with the consent of John during his life, if he should survive Sarah. John dies in

the lifetime of Sarah. Can the trustees exercise the power?

The trustees cannot exercise the power, because the death of John destroyed the power: since, where the consent of two or more persons is required, the death of one of them destroys the power, for the consent of the survivor will not satisfy the words of the power.

If a trustee pays money under a power of attorney from a person who, at the time of payment, was dead, or had revoked the power, will the trustee under any, and if any what, circumstances be liable to repay the money?

He will not be liable if he paid the money *bond fide*, without notice of the avoidance of the power; for it is enacted by the statute 22 & 23 Vict. c. 35, that no trustee making any payment, or doing any act *bond fide*, in pursuance of any power of attorney, in ignorance of the death of the person who gave the power, or of his having done some act to avoid it shall be liable for the money so paid or the act so done.

Is there any, and if any what, difference between the rule of law and the rule of equity, with respect to a debt due from an executor to a testator, whose will appoints him executor?

Yes, the rule of law was in direct conflict with the rule in equity: at law, if a creditor appointed his debtor executor of his will, the appointment would operate as a release of the debt; for the debt was a

chose in action, and a man could not either solely or jointly with others bring an action against himself: in equity, the debt was not extinguished, but the executor was bound to account for his debt to the estate of the testator. And this latter rule will now be acted on by the Court, as it is enacted by the S. C. J. Act, 1873, that in all matters, not therein particularly mentioned, in which there is any conflict between the rules of equity and law, the rules of equity shall prevail (s. 25).

The Court prohibits persons filling certain characters from becoming purchasers: name the principal of such characters, and the ground upon which the prohibition is founded.

Generally speaking, trustees who have accepted the trusts, agents, commissioners, assignees, and trustees of bankrupts, solicitors, auctioneers, creditors who have been consulted on the mode of sale, counsel or any person who, by being employed or concerned in the affairs of another, has acquired a knowledge of his property, are incapable of purchasing such property; for if persons, having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity.

If a trustee for sale purchases the trust property for its full value in the name of another person, and pays the purchase money to the parties entitled to it,

and afterwards expends money in permanently improving the property, can the sale be set aside, and if so, when and at whose instance, and upon what terms?

The leading case of *Fox v. Mackreth* established the rule that a purchase by a trustee for sale from his *cestui que trust*, even for an adequate price, and at no advantage, will be set aside at the option of the *cestui que trust*. Such a sale, therefore, can be set aside by the *cestui que trust*, and he can insist on a re-conveyance, if the estate is still in the hands of the trustee, or of any purchaser from him *with notice*. But this he can only obtain on the terms of repaying the purchase money, with interest at £4 per cent., and all sums expended in repairs and improvements of a permanent and lasting nature; on the other hand, there must be an allowance for acts that deteriorate the value of the estate, and the trustee must account for all the rents and profits, and must also pay an occupation rent for such part of the estate as may have been in his actual possession (1 L. C. Eq. 156).

What is the rule in equity as to the purchase by a trustee of the trust estate, and what course would you advise on behalf of a trustee purchaser, in order to assure his title and prevent any after impeachment of it?

The rule is, as above stated, that a trustee cannot purchase the trust estate of himself, even at a public

auction. But a *cestui que trust* who is *sui juris*, and has discharged the trustee from his trusteeship can enter into a new contract with him for the sale of the trust estate. The trustee must, however, be able to show that he communicated to his *cestui que trust* all the knowledge of the value of the estate that he acquired when he was trustee. If the *cestui que trust* is not *sui juris*, the only terms upon which a trustee can become a purchaser is by applying to the Court showing that so much is bid, and offering to give more, and perhaps this would be the safest course to take in any case.

If one trustee receives trust money, and hands it over to his co-trustee, are both or which, of them liable?

They will both be liable; except in the case of money remitted to a co-trustee, or co-executor, to be paid by him in his neighbourhood where the trustee or executor remitting the same, in case he had money of his own, would naturally have remitted it to some one to pay it away instead of undertaking a journey for the purpose of paying it himself.

Is a trustee liable under any and what circumstances for the loss of a trust-fund by the fraudulent act of his solicitor?

He is liable for such loss, although in employing such solicitor he may have exercised ordinary care and discretion.

If a trustee allow his agent to apply the trust-fund

in a manner constituting a breach of trust, of which the agent is aware, can the cestui que trust proceed both against the trustee and his agent, or against either of them at his option ?

An agent employed by a trustee is accountable in general to his principal only, and cannot as a constructive trustee be made responsible to the *cestui que trust*. But of course the rule does not apply where the agent has taken an actively fraudulent part, and so made himself a principal. In the case above, therefore, the *cestui que trust* may proceed against both the trustee and the agent, and it would be advisable to do so: but he can at his option proceed against either alone.

A settlement, dated in 1861, authorised the trustees to invest the trust-funds in Government or real securities in England: may the trustees invest the trust-fund in any other and what countries and by virtue of what authority? Is there any difference if the settlement be dated in 1840 ?

Besides investing in Government or real securities in England, the trustees may invest in real securities in any part of the United Kingdom, or in the Stock of the Bank of Ireland, or in East India Stock, new as well as old, or in any securities the interest of which is guaranteed by Parliament, unless they are expressly forbidden so to do by the trust instrument. This is under 22 & 23 Vict. c. 35 (as explained by 30 & 31 Vict. c. 132) which has been made to operate retrospectively by the Act of 1860:

so that it matters not what is the date of the trust instrument.

If a trustee is bound by the terms of his trust to invest in the public funds, but instead of doing so retains the money in his hands, what is the claim against him which his cestui que trust can recover in equity?

He is liable at the option of the *cestui que trust* either for the money, and interest at £4 per cent., or the stock which might have been purchased therewith at the time when the investment ought to have been made and the dividends.

Is the claim of cestui que trust against a trustee for a breach of trust a simple contract or specialty debt? State the reason for your answer.

The debt created by a breach of trust is only regarded as a simple contract debt, even where the trust arises under a deed executed by the trustees; unless the trustee who committed the breach has acknowledged the debt under seal; or unless by deed he has not merely accepted the trust, but has agreed or declared that he will execute the trusts.

Is an executor allowed his reasonable expenses out of the trust-fund?

He is allowed those expenses which are legitimately and properly incurred.

Is an executor liable for losses arising from acts unauthorised by the will creating the trust: is he chargeable with profits made by him in like manner, or with interest only?

If an executor or trustee act in any way not authorised by the will or trust he does so at his peril, and will be liable for all losses arising therefrom. And as an executor or trustee is never permitted to make any profit to himself from the property entrusted to him, he is chargeable with all profits made by him in the same way, and he cannot set off the profit against the loss.

SPECIFIC PERFORMANCE.

How did the remedy given by a court of equity for the non-performance of a contract differ from that given by a court of law?

By the common law if a party who ought to perform a contract or covenant failed to do so, no redress could be had except in damages. But in equity a specific performance of a contract, covenant or duty, would be decreed, where damages would not afford an exact compensation. Under the S. C. J. Act, 1873, both law and equity are administered by the Court concurrently, and it can either award damages or direct specific performance.

State the essential ingredients in contracts or agreements which are required in order to obtain a specific performance of a contract.

Besides the ordinary legal essentials, that the contract, if within the statute of frauds, must be in writing and signed, that it must be made between parties able and willing to contract, that there must be a

valuable consideration, and that the object of the contract should not be illegal or immoral ; it is also essential that the contract is not one for the breach whereof damages would fully compensate. Thus, in the leading case of *Cuddee v. Rutter*, specific performance of an agreement to transfer a certain sum of stock was refused, on the ground that no damage would be occasioned by the non-performance of the agreement specifically, if the difference between the price of the stock was paid (1 S. C. Eq. 709).

When will the Court not enforce specific performance of a contract ?

The following are some instances where the Court will not decree specific performance:—(1) Where damages would amount to a complete compensation ; (2) Where the terms of the contract are not certain and definite ; (3) Where the contract has become incapable of being substantially performed on the part of the person seeking relief ; (4) Where the same person has been guilty of negligence affecting the essence of the contract ; (5) If the contract is founded in imposition, surprise, misrepresentation or fraud of any kind ; (6) Where it would be against public policy.

On the offer of the late East Indian Loan, A. tendered in writing to take £100,000 at £102 per cent. and the company in writing accepted the tender ; but A. refused to complete the bargain : will the Court enforce the fulfilment of the contract ? State the reason for your answer.

The Court will not enforce the fulfilment of the contract: for damages would amount to a complete compensation for the breach (*Cuddee v. Rutter*).

Define champerty and maintenance respectively, and state some of the cases in which exception is made to the general rule against champerty and maintenance.

Champerty is a bargain between a plaintiff or defendant in a cause and another person who has no interest in the subject in dispute (*campum partire*) to divide the land or other property sued for between them if they prevail at law, in consideration of the other person carrying on the suit at his own expense. Maintenance is properly an officious intermeddling in a suit which in no ways belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it. Exceptions are made, however, to the rule against champerty and maintenance in the case of father and son, or of the husband of an heiress, or of a master and servant, or the like.

What amounts to an equitable assignment of a chose in action?

As a general rule anything written, said, or done in pursuance of an agreement and for valuable consideration to place a *chose in action* or fund out of the control of the owner, and appropriate it in favour of another person, amounts to an equitable assignment. Notice must be given to the debtor or holder of the fund. Thus where A. borrowed a sum of money of B. and gave him a draft upon a fund due to him (A.) out

of the exchequer which was deposited with the officer from whom the fund was payable, it was held that this amounted to an assignment of the fund which prevailed against A.'s assignees under his bankruptcy (*Row v. Dawson*, 2 L. C. Eq. 667). Since the new Act debts and *choses in action* may be assigned at law, but to amount to a *legal* assignment, *i.e.*, so as to pass the legal right to receive and give discharges for the debt, it must be an absolute assignment *in writing* under the hand of the assignor, and notice must be given to the debtor, &c.; such assignment takes effect from the date of such notice (s. 25).

A party entitled to a fund in the hands of trustees executes an assignment of it, by way of security for money borrowed, is anything, and what, besides the assignment, necessary for the effectual security of the lender?

Yes; the trustees should first be asked if they have had notice of any previous sale or charge. As soon as the assignment is executed, notice must be given to the trustees, for in all assignments of equitable interests, other than equitable estates, he who gives notice to the holder of the fund has priority over him who does not.

If A. assigns to B. a policy on his own life for a valuable consideration, and subsequently assigns the same policy to C., also for a valuable consideration, and B. and C. both give notice of their respective assignments to the assurance office, but C.'s notice is

served on the office before B.'s notice, what will be the relative legal position of B. and C.?

If C. had no notice of B.'s assignment, he will have priority over B., for in assignments of *choses in action* he who first gives formal notice to the holder of the fund is entitled to priority.

Is the assignee of a chose in action bound by all the equities to which it was liable in the hands of the assignor, and why?

He is so bound, even without notice, unless the *chose in action* be a bill of exchange or promissory note, for the assignor cannot confer a better title than he himself had.

In order to obtain specific performance of a contract, must a pecuniary consideration be shown, and is any distinction made in cases of sales by expectant heirs?

In order to obtain specific performance of a contract, it is necessary to show that it is founded on some *valuable* consideration, though it need not be of a pecuniary nature; and, as a general rule, the Court will not go into the question of the adequacy of the consideration. But in the case of sales by expectants, the purchaser is called upon to show the reasonableness of the transaction, and the adequacy of the price, and that it was fully approved of by the person from whom the *spes successionis* is entertained, and this, as before explained, is in no way altered by the late Act, 31 Vict. c. 4.

Are there any circumstances under which an agree-

ment, within the Statute of Frauds, not made in writing, would be enforced by the Court? If so, state those circumstances, and the grounds on which such an equity would prevail.

Yes: (1.) Where the agreement is fully set out in the pleadings, and is admitted by the defendant, and he does not insist on the statute as a bar, for in this case there can be no fraud; and the defendant, by not insisting on the statute impliedly waives it, the rule being *quisque renunciare potest juri pro se introducto*. (2.) Where it has been prevented from being reduced into writing by the fraud of the defendant; for the Court will not allow a statute passed for the suppression of fraud to be used as an engine of fraud, and a man can never take advantage of his own wrong. (3.) Where there has been a part performance; but acts of part performance must be clearly and exclusively referable to a complete agreement. Thus, in the leading case of *Lester v. Foxcroft*, specific performance of a parol agreement to grant a lease was decreed, notwithstanding the Statute of Frauds, after acts of part performance on the part of the lessee by pulling down an old house and building new houses, according to the terms of the agreement; for it was against conscience to suffer the party who had entered and expended his money, on the faith of a parol agreement, to be treated as a trespasser, and the other party to enjoy the advantage of the money he had laid out (1 L. C. Eq. 693).

What acts amount to part performance of a parol agreement to sell land? Does the delivery of the abstract, the payment of deposit, or letting the alleged purchaser into possession?

The acts must be such as are clearly and exclusively referable to a complete agreement, and must have been done with no other view than to perform such agreement; for instance, if possession is delivered to the purchaser according to the contract. But acts merely introductory or ancillary to an agreement, though attended with expense, are not considered as acts of part performance. Thus, the delivery of the abstract, or payment of deposit, is not an act of part performance (1 L. C. Eq. 697).

When the consideration in a contract for a purchase is an annuity for the life of the vendor, and he dies before completion, will the Court enforce it?

The Court will enforce specific performance in such a case, notwithstanding the death of the annuitant, but it will inquire with some jealousy into the fairness of the transaction (see Dart. V. & P. 231).

If A. contracts to sell land to B., and upon investigation of the title it is found doubtful, can B. compel A. to complete the sale, either with or without giving an indemnity?

B. cannot compel A. to complete the sale and give him an indemnity, as in no case will an indemnity be enforced against either party, unless it is provided for by special agreement. But B. can, if he chose,

accept the title and compel specific performance without an indemnity.

Will the Court in any, and what, cases compel a purchaser to accept an equitable title without a conveyance of the legal estate?

A purchaser will not be compelled to take a merely equitable title, unless the sale be under a decree of the Court, and then only where the legal estate is outstanding, without any claim of interest on the part of the person in whom it is vested, or is outstanding in an infant, from whom it may be readily got in (Dart. V. & P. 1009 & 1095).

When will letters operate as a binding agreement for the sale and purchase of an estate?

As a general rule, any writing signed by the party to be charged, or his agent, and which either expressly or by reference to other writings, determines the parties to and subject matter of the contract, and fixes all its terms, is sufficient to constitute a binding agreement, but no writing failing in any of the above particulars will so operate. Thus, a letter containing an admission of the bargain, and of all its essential terms, constitutes a binding agreement, although the writer at the same time repudiates his liability. A letter binds the writer from the time of the inception of its transmission, not of its receipt by the other party.

A. writes to B. offering him £5000 for the purchase of his (B.'s) freehold house in Berkeley Square. B. writes

to A. in answer accepting the offer, and adding that he will instruct his solicitors to prepare an agreement. A. and B. differ afterwards upon the details of the intended agreement and none is signed. Can specific performance be enforced at the suit of A. or B. or both?

Formerly it was held that specific performance lay in such a case as there was a complete agreement by the letters, and the sending them to a solicitor to prepare a formal agreement did not alter the rights of the parties (*Fowles v. Freeman*, 9 Ves. Jun. 361). In a late case, however, it was decided that so sending the letters was evidence that the parties did not intend to bind themselves until the agreement was reduced into form (*Ridgway v. Wharton*, 6 H. L. Cas. 238; 5 W. R. 804).

A. agrees to purchase of B. an annuity on the life of C., C. dies the day after the contract, can B. enforce payment of the purchase money? Could he have done so had C. died the day before the contract? Give the reasons for your answer.

In the first case, A. can enforce payment of the purchase money, for it is a rule in equity that from the date of the contract the estate, or other subject matter contracted for, belongs to the purchaser, and he must bear any loss that may happen after that date. In the second case he cannot, as the subject matter did not exist at the time the contract was made.

An agreement for sale of a reversion provides that the purchaser shall take the vendor's title as it stands, that the purchase shall be completed on a fixed day, and that time shall be of the essence of the contract, what is the effect of this last provision?

That on failure of either party to keep the dates assigned by the contract, either for completion, or for any of the steps towards completion, the other party, before taking any further steps under the contract, may treat it as abandoned.

A., being an attorney, agrees to sell his business as such attorney to B., is, or is not, this such an agreement as a court of equity will enforce? And give the reason for your answer.

At one time it was doubtful whether a contract for the sale of the business of an attorney was legal; but now it is held valid at law, and will be enforced in equity (1 L. C. Eq. 729). In the case of *Whittaker and Another v. Howe* (3 Beav. 383), the plaintiffs had entered into an agreement with the defendant to purchase the business carried on by the defendant as an attorney; the plaintiff paid £5000 for the absolute purchase of such business, and in consideration thereof the defendant agreed to put the plaintiffs into possession of all the profits of the business, and further agreed that he would not afterwards practice, as solicitor or attorney, in any part of Great Britain, for the space of twenty years, without the consent of the plaintiffs. On a bill filed by the plaintiffs to enforce

this agreement, the agreement was held valid, and an injunction was granted to restrain Howe, the defendant, from practising in any part of great Britain, and from endeavouring to induce any persons, clients of the defendant, to cease to employ plaintiffs as their attorneys.

Your client buys an estate, on the investigation of the title, it appears that the vendor cannot make a good title to a small field detached from the rest of the property, and not of any material consequence to your client, who, however, wishes to be off his bargain; will a court of equity compel him to fulfil his contract, and upon what terms?

My client, I am afraid, cannot get off his bargain, as the vendor can enforce specific performance on making a reduction in the purchase money, according to the value of the field to which no title is shown. The only case when the objection that no title is shown to a particular part of the estate is a valid defence to a suit for specific performance, is where such part is *material*, either with regard to the proportion it bears to the entirety, or in its being important with regard to the enjoyment of the residue. In the case put, the field is both small and of no local importance, and therefore a reduction in the purchase money will be ample compensation to my client.

Will the Court decree a specific performance of an agreement for reference to arbitration? And give the reason for your answer.

It will not; deeming it against public policy to exclude any person from the appropriate tribunals.

In what cases will the Court decree the specific performance of the sale or purchase of an estate when the price is agreed to be fixed by the arbitration of third persons?

When the arbitrators have made their award and fixed the price, the contract is complete; and the Court will enforce specific performance provided the award is unexceptionable.

Will the Court enforce a voluntary contract in the nature of a settlement?

No; equity will not enforce an executory trust raised by a covenant or agreement, unless it is supported by valuable consideration (*Ellison v. Ellison*, ante, p. 32).

What is a meritorious consideration, and will it support a contract in equity?

A meritorious or good consideration is one consisting of natural love and affection. A contract founded on such a consideration will not, as before explained, be enforced in equity.

Will the Court decree the specific performance of a covenant to invest money in lands, and to settle them in a particular manner?

If the covenant were made on valuable consideration, specific performance of it will be decreed, not only at the instance of the covenantee, but also at the instance of those persons to whom the lands directed

to be purchased are limited, and those who stand in their place.

In what cases and upon what grounds will the Court compel the delivery up of specific chattels to the owners?

Only when the chattels are from their nature of some *peculiar* value to the owner, as in the case of heirlooms and articles of *vertu*. Thus, in the leading case of *Pusey v. Pusey*, the Court directed specific delivery of a certain horn, which had gone along with the plaintiff's estate, and was delivered in ancient time to his ancestors to hold their lands by. The ground of the jurisdiction is the same as that upon which the specific performance of an agreement is enforced, viz., that damages will not afford an adequate compensation (1 L. C. Eq. 735).

Where a party engages for the performance of an agreement under a certain penalty, can the party relieve himself from the performance by offering to pay the penalty, or will equity notwithstanding compel the performance?

Equity will still enforce the agreement, as a person cannot evade performance of his contract by payment of the penalty for the breach of it.

ADMINISTRATION.

What protection does the Court afford to creditors of persons deceased?

The equal administration of the deceased's estate, the marshalling of assets and securities, and the care of the property, and since the S. C. J. Act, 1873, where the deceased's estate is insufficient to pay all his debts, the Court acts on the same rules as to the respective rights of secured and unsecured creditors, and as to the debts and liabilities provable, and as to the valuation of future or contingent liabilities, as in the case of bankruptcy; and all creditors are entitled to prove for, and receive dividends out of, such estate in the same way as in bankruptcy.

What is the order in which in an action assets of various descriptions are administered for the payment of debts?

(1.) The general personal estate; (2.) Any estate particularly devised simply for the payment of debts; (3.) Estates descended; (4.) Property devised and bequeathed to particular devisees and legatees, but charged with the payment of debts; (5.) General legacies; (6.) Specific legacies; (7.) Lands comprised in a residuary devise and lands specifically devised; (8.) Personality and realty over which the deceased has exercised a general power.

A testator, by his will, charges his real estate with the payment of an annuity and the legacies given by his will. The personal estate is absorbed, and the real estate is insufficient to keep down the payments of the annuity. What is the effect upon the annuity and legacies under these circumstances?

An annuity charged on the *personal* estate is a general legacy merely, and therefore abates proportionately with the general legacies. But if an annuity is given as a specific interest in the real estate, it will not abate with the general legacies, even though such legacies are charged on the real estate. If the real estate is insufficient to keep down the annuity, it will be ordered to be sold, and the principal applied in satisfaction thereof.

In the ordinary administration of an estate in what class are voluntary deeds of gift or bonds payable, before or after legacies or pari passu with them? Give the reasons for your answer.

Where a voluntary instrument, although effecting no transfer of property, creates a valid legal obligation, equity will give effect to it, and allow the obligee to prove the debt against the assets of the obligor, and he will have priority over all legatees, but will be postponed to all creditors (*Ellison v. Ellison*, 1 L. C. Eq. 257).

Where there are specialty, simple contract and judgment creditors of a deceased person, are any of them, in the event of a deficiency, entitled to a priority of payment? And if so, state the priorities?

The judgment creditors must be paid in full before any of the specialty and simple contract creditors. These last now stand in equal degree, and are paid accordingly (32 & 33 Vict. c. 46).

How is an Irish judgment regarded in administering assets in England?

As a simple contract debt, as are all other foreign judgments; if duly registered, in accordance with 31 & 32 Vict. c. 54, it will rank with an English judgment.

A trader dies seised of real estate, and which he has devised by his will but not thereby charged with the payment of his debts, and which estate would be assets in the hands of the heir for the payment of specialty debts. Can simple contract creditors obtain any, and what, assistance from a court of equity in discharge of such simple contract debts, and under what authority?

Under the 3 & 4 Will. IV. c. 104, when any person dies seised of any estate, or interest in real estate, whether freehold or copyhold, which he has not charged with or devised subject to his debts, the same become assets, and as such liable for the payment of his debts, whether on simple contract or by specialty. There was a provision that, in such a case, all debts by specialty, in which the heir was bound, be paid in full before any part of the simple contract debts; but this provision is repealed by the 32 & 33 Vict. c. 46, as far as regards persons dying after 1st January, 1870, as under that Act all creditors are to stand in equal degree, and be paid accordingly.

Explain the mode of administering an insolvent estate as between specialty and simple contract creditors where the assets are partly legal and partly equitable.

Formerly in such a case, although equity could not

take away the legal preference on legal assets, yet, if one creditor had been partly paid out of such legal assets, when satisfaction came to be made out of equitable assets, the Court would have postponed him until there was an equality in satisfaction to all the other creditors out of the equitable assets, proportionable to so much as the legal creditor had been satisfied out of the legal assets. This was on the maxim that *he who seeks equity must do equity*. Now in the administration of the estates of persons dying after 1st January, 1870, all creditors, whether by specialty or simple contract, stand on an equal footing, and are paid accordingly, whether the assets are legal or equitable.

A person dies indebted to a company, registered under the Companies Act, 1862, for calls upon shares held by him. In the administration of his assets, has the company any priority over any, and which, of his other debts?

Since 32 & 33 Vict. c. 46, abolishing the distinction (in this respect) between simple contract and specialty debts, the company has no priority. Formerly it would, as the claim for calls ranks as a specialty debt.

If a testator, by his will, charges his real estates with the payment of his debts, will or will not such a devise have any, and if any, what effect on a debt which had been previously barred by the Statute of Limitations?

No effect; debts actually barred by the Statute of Limitations are not included in a trust for payment of debts.

Is an executor justified in paying a debt of his testator which is barred by the Statute of Limitations?

An executor or administrator is not bound to plead the Statute of Limitations to any debt, but may, if he please, pay the same, notwithstanding the time limited by the statute may have expired.

Has an executor, who is a creditor of his testator, any advantage over other creditors?

Yes; he may retain his own debt out of the assets in preference to all other debts, even although his own debt is barred by the Statute of Limitations.

A person conveys his estate to trustees, upon trust to sell, and apply the proceeds of the sale in discharge of all his bond debts, and the interest then due and to grow due thereon up to the day of payment, upon taking the account it is found that the principal and interest upon some of them exceed the penalty of the bond. In this case are the obligees entitled to the excess? If not, state the reason why?

They are not; unless there are special circumstances in their favour, as if the debtor had been delaying them by vexatious proceedings. (Wm. P. P. 108.)

What is meant by the adjustments between creditors and legatees, and between debtor and creditors, made by courts of equity, and commonly called marshalling of assets?

It is such an arrangement of the different funds of the common debtor of two or more creditors or claimants as may satisfy every claim, so far, as without injustice, this can be done, notwithstanding the claims of particular individuals to prior satisfaction out of some one or more of such funds. Thus, if creditors exhaust the personal estate, legatees, not being residuary or charitable legatees, are allowed to go against real estate descended.

Is an executor justified in paying a simple contract debt before a specialty debt, or one simple contract or specialty debt before another simple contract or specialty debt?

If the testator died after the 1st January, 1870, the executor may pay one debt in preference to another, whether such debts are by specialty or simple contract, as under the Act of 1869 all creditors, whether by specialty or simple contract, stand in equal degree. Before that Act he must have paid all the specialty debts before the simple contract debts, and if he paid any of the latter before the former he was personally liable. He could always, however, pay one creditor before another standing in equal degree.

A. by his will gives to charitable uses the residue of his property consisting of Consols, railway shares, a share in the New River Company, shares in various insurance and dock companies, long leaseholds for years; and leaseholds for lives, a common money bond and arrears of rents, are any of these gifts void, and

why? And who is entitled to the benefit of such portions of the said property as do not pass to the charitable uses?

The gifts of the share in the New River Company (which is real estate) and of the leaseholds for years or lives are void, as the Statute of Mortmain prohibits the bequest for charitable purposes of personal estate in any degree savouring of the realty. The New River share will descend to the heir-at-law, or pass to the residuary devisee, if one, the leaseholds for lives will also devolve on the heir as special occupant, if the estate *per autre vie* was limited to the testator and his heirs; if no special occupant, they will, together with the leaseholds for years, pass to the next of kin, or residuary legatee, if one. The gift of the railway shares is good unless the Act or charter incorporating the company expressly declares the shares to be real estate; and the gift of Consols, shares in the insurance and dock companies, the common money bond and arrears of rent are also good, as these are pure personalty.

Is a bequest of consols to be applied in rebuilding a public hospital or parsonage house valid? Give the reasons for your answer.

It is valid: as it has been decided that a bequest of money to be laid out in building on land already in mortmain is good.

Will the court sustain a bequest of money to executors to build almshouses or an hospital in case

any person should, within a limited time, purchase or give land as a site? What law was supposed to stand in the way of such a bequest, and what is now the established doctrine as to this?

It was formerly held that a gift which tended directly to bring lands into mortmain was void. But this has been overruled.

A testatrix bequeaths a charitable legacy of £900, and charges it on all her property, which consists of £8000 realty, £4000 mixed, and £2000 pure personalty, what amount will the charity be entitled to receive, and on what principle?

Only to the sum of £150, on this principle: it is a rule of the Court not to marshal the assets in favour of a charity, by throwing the debts and legacies on the realty or mixed property, and leaving the pure personalty to satisfy the charitable bequest, unless there is a direction to that effect in the will; but it appropriates the whole estate, as if no legal objection existed to applying part to charitable uses, and holds so much of the charitable legacies to fail as would be payable out of the prohibited fund: thus, in this case, the whole estate amounts to £12,000, and £10,000, i.e., five-sixths of the whole, consists of real and mixed property; five-sixths, therefore of the legacy to the charity will fail.

Explain what is meant by the rule or doctrine maintained by the Court, and which is commonly termed cy près?

Where the intention of the testator is incapable of being literally acted upon, or its literal performance would be unreasonable or illegal, the Court will direct its execution *cy près*, that is, in some method conformable to the general object, and adhering as closely as possible to the specific design of the testator. Thus, if the testator give lands to the unborn son of a living person for life, and, after the decease of such unborn son, to *his* sons in tail, this last limitation would be void; but the Court, acting on the above doctrine, will, instead of confining the unborn son to the mere life estate, and annulling the subsequent limitation, give to such son an estate tail, so as to afford to his issue a chance of inheriting.

Where there is a bequest for charitable purposes, but the special mode of application is impracticable, will the Court carry the bequest into effect in any, and what manner?

The Court will carry the bequest into effect *cy près*, that is, in some method conformable to the general object, and adhering as closely as possible to the specific design of the testator. Thus, where a sum of money was bequeathed to trustees, to be distributed among the inhabitants of several specified parishes in money, physic, or clothes, as the trustees should think fit, and the fund ultimately became too large for such objects, the Court directed it to be applied in the further objects of instructing and apprenticing the children in the parishes named.

A testator gives a specific bequest to A. and directs that in consideration of such bequest A. shall pay his testator's debts, and makes A. his residuary legatee and executor. The debts far exceed the value of the bequest. Is A. bound to pay them in full or not? Give the reason for your answer.

If A. accepts either of the benefits under the will he can only take them subject to the payment of the debts in full. For he cannot take the specific legacy without performing the condition annexed to it: and he is not entitled to the residue until all the debts are paid.

POINTS RELATING TO MORTGAGES.

What is the meaning of the maxim "once a mortgage always a mortgage"?

The meaning of this maxim is that no agreement in a mortgage can make it irredeemable, or confine the right of redemption to a particular time or to a particular description of persons. Thus, in the leading case of *Howard v. Harris*, where Howard covenanted that no one but *he, or the heirs male of his body* should be admitted to redeem, upon Howard's death without issue the jointress was admitted to redeem, on the ground that an estate cannot at one time be a mortgage and at another time cease to be so, by one and the same deed. (2 L. C. Eq. 947.)

If a conveyance appear absolute on the face of it,

what evidence will the court admit to show that it was intended as a security ?

If the money paid by the grantee would be a grossly inadequate price for the absolute purchase of the estate ; if he was not let into immediate possession of the estate ; if he accounted for the rents to the grantor, and only retained an amount equivalent to interest ; or if the expense of preparing the deed of conveyance was borne by the grantor ; each of these circumstances has been considered as evidence showing, with more or less cogency, that the conveyance was intended merely by way of security.

What relief does the Court give where a mortgagee wishes to acquire an absolute title to a forfeited mortgage, and to foreclose all equity of redemption ?

The relief given to the mortgagee is, permitting him to foreclose the equity of redemption unless the mortgage money, together with interest and costs, be paid within the time fixed by the Court ; by this means if such money, interest and costs be not paid, the mortgagee acquires an absolute title to the mortgaged estate, freed and discharged from all right or equity of redemption.

Within what period must a foreclosure suit be brought ? And what decree is the Court empowered by a modern statute to make in such a suit ?

A foreclosure suit cannot be brought but within twenty years after the right first accrued, or within twenty years after the last payment of any part of

the principal money or interest. By the statute 15 & 16 Vict. c. 86, s. 48, on an action for foreclosure being instituted, the Court may now decree a sale.

What relief does the Court give where a mortgagor is desirous of redeeming a forfeited mortgage?

The relief granted is by allowing him to redeem the estate on payment of principal, interest, and costs; the mortgagee is treated precisely as a trustee for the mortgagor, inasmuch as he is compelled to reconvey the estate, and account for every kind of profit that he has made, or which, but for his wilful default, he might have made.

Where a mortgagee is in possession, what is the time limited within which a mortgagor may redeem his estates?

Within twenty years next after the time at which the mortgagee obtained such possession of the mortgaged property, unless in the meantime an acknowledgment of the title or right of redemption of the mortgagor has been given to him in writing, signed by the mortgagee, or the person claiming through him, in which case he can redeem at any time within twenty years from the date of such acknowledgment.

What responsibility does the mortgagee incur by entering into the possession of lands mortgaged to him?

As before explained he must account for every kind of profit that he has made or might have made without wilful default: and he must pay an occupation

rent for such part as he keeps in his own possession : he must also keep the property in necessary repair, but is not obliged, nor is allowed, to lay out any further money than is necessary for this purpose : he must not commit waste unless the security is insufficient, in which case only is he allowed to fell timber or open mines.

Can a mortgagee make his mortgagor account for rents or profits received by him (the mortgagor) while in possession, and whether the estate is a sufficient security or not?

So long as the mortgagor continues in possession by the permission of the mortgagee, he is entitled to take the rents and profits in his own right, without rendering any account whatever to the mortgagee, though the mortgaged property may have become an insufficient security.

State the general purposes for which a mortgagee in possession may expend money upon the mortgaged estate, which will be allowed to him by the Court in taking the account between the mortgagor and mortgagee?

He will be allowed any sums paid for arrears of rent, or for maintaining the title to the estate, or for rebuilding the premises, or for necessary repairs, or the expenses of renewing a renewable leasehold, with interest from the time the sums were advanced. He will also be allowed the expenses of insuring the property or appointing a receiver under the Act of 1860,

but he cannot by contract or otherwise entitle himself to any charge for management. He is not allowed for general improvements made without the consent of the mortgagor, as he has no right to make it more expensive for the mortgagor to redeem than may be required for keeping the property in proper repair.

Can a mortgagee be compelled to produce his mortgage deed to the mortgagor when the application is made bonâ fide, and only to obtain information with a view of paying off the mortgage?

A mortgagor is always entitled to inspect the mortgage deed, although not the other title deeds in the hands of the mortgagee, for the mortgage deed contains a proviso for redemption, and is the evidence of the mortgagor's title to the equity of redemption (*Patch v. Ward*, L. Rep. 1 Eq. 436).

A. mortgages to B. without delivery of the title-deeds, and executes a subsequent mortgage of the same property to C. (who has the title-deeds) without notice of the first mortgage. Will B. be postponed to C.?

If B., the first mortgagee, voluntarily, distinctly, and unjustifiably, through fraud or gross negligence, allows the mortgagor to retain the title deeds, he will be postponed to C. But the onus of proving such fraud or negligence is on C.

A mortgagee has called in the mortgage money which the mortgagor is unable to pay, but a third party is willing to advance it upon a transfer of the mortgage. Is the mortgagee bound to transfer the

mortgage, and what course must be pursued if he refuses?

The ordinary form of the proviso of redemption now is that the mortgagee shall on payment of what is due to him reconvey the premises to the mortgagor, his heirs, or assigns. "or as he or they shall direct:" under such a proviso the mortgagee must transfer the mortgage if so directed by the mortgagor. Otherwise in strictness he is not bound to do so, and the only course open would be for the mortgagor to take a reconveyance, and then grant a fresh mortgage to the third party.

In the power of sale in a mortgage deed of real estate, it is declared that the mortgagee shall hold the surplus of the moneys arising from the sale in trust for the mortgagor, his "executors, administrators, or assigns." After the sale under such power, is the surplus to be considered real or personal estate, and does it make any difference whether such sale takes place in the lifetime of the mortgagor, or after his death?

Where the surplus produce, on the execution of a power of sale in a mortgage in fee, is directed to be paid to the mortgagor, his executors, administrators, or assigns, this is not of itself a conversion of the equity of redemption into personal estate. If the sale takes place in the lifetime of the mortgagor the surplus is personal estate, and devolves on his personal representatives: but if he dies before the sale is made, the equity of redemption descends to the heir, and he is entitled to the surplus.

What is an equitable mortgage? In what respects is it objectionable as a security?

An equitable mortgage is defined *post*. The objection to it as a security is, that the mortgagee has only an equitable interest, the legal estate still remaining in the mortgagor. The former, therefore, has none of the *legal* rights and remedies of a mortgagee (*e.g.* the right of possession, and the right, on giving notice to an existing tenant, to distrain for rent), but he can only enforce those rights and remedies which are purely of an equitable nature. In addition to this he may lose the benefit of his security altogether, by being cut out by a subsequent mortgagee, who obtains the legal estate without notice of his charge.

In what respect does an equitable differ from a legal mortgage, and are there any and what, proceedings for converting the equitable into a legal mortgage?

The difference between them is shown in the preceding answer. The Court will on application compel the equitable mortgagor to execute a valid legal mortgage, and this whether he has expressly agreed to do so, or whether the mortgage is by deposit merely, for by making such deposit he impliedly contracts to make such an assurance of his interest as will vest his interest in the mortgagee.

In what cases is notice essential to give effect to equitable mortgages?

In the case of a mortgage of a *chose in action* notice is essential: thus an equitable mortgage of a policy of insurance, or of the certificates of shares in a public company may be made by deposit, but notice should be given to the company.

A. lends money to B. on a deposit of title deeds, and an agreement to execute a mortgage with power of sale: B. fails to pay the money or to execute the mortgage, and A. wishes to sell the property; can he sell under the power before the mortgage has been executed?

A. clearly has no power to sell until the mortgage deed is executed. He must apply to the Court, which will direct a sale.

Can title deeds in the hands of an equitable mortgagee by deposit be made a security (subject to the lien of the depositary) to another person making a subsequent advance of money to the owner of the estate?

This can be effected by any written agreement or directions or other instrument in writing showing the intention of the creditor to make his land a security for the advance.

APPORTIONMENT AND CONTRIBUTION.

If an annuitant under a will dies before the day of payment, is any portion of the annuity payable in that case, and under what authority?

Yes, under the Apportionment Act, 1870, the representatives of the deceased are entitled to an apportioned part of the annuity.

A tenant for life pays off incumbrances on the fee and does not take a transfer of the security. What are the rights of his representatives with reference to the amount paid off?

His representatives will stand in the place of the incumbrancers, for it must be presumed that he intended to keep the incumbrances alive, against the inheritance, for his benefit. But this presumption may be rebutted.

On what principle is the right and duty of contribution between sureties founded?

In the leading case of *Dering v. Earl of Winchelsea*, the principle was established that the doctrine of contribution amongst sureties is not founded in contract, but is the result of general equity, on the ground of equality of burthen and benefit. And it was therefore decided that where three sureties are bound by different instruments, but for the same principal and the same engagement, they shall contribute. (1 L. C. Eq., 78 *et seq.*)

How is a partnership dissolved?

A partnership may be dissolved, (1) By effluxion of time; (2) By mutual consent; (3) By decree of the Court in the cases mentioned in the next answer; (4) By execution on the partnership effects by a creditor of a partner or by his assigning his share; (5) By bankruptcy of a partner; (6) By death, or marriage of a female partner.

In what cases will the Court decree a dissolution of the partnership before the regular time?

The Court will dissolve the partnership before the regular time, in case, by reason of the ill-feeling between the partners or other circumstances, it is impracticable to carry on the undertaking at all, or at least according to the stipulations of the articles, or beneficially, or in case of insanity, permanent incapacity or gross misconduct of one of the partners. Also where a partner was induced to enter into the partnership by a false representation.

If a partner becomes lunatic, does the lunacy occasion a dissolution of the partnership?

No: until a decree for dissolution is made by the Court. The Court will make such a decree if the insanity be permanent.

In the case of a partnership existing at the will of the parties, will the Court under any circumstances interfere to prevent a dissolution?

Yes, the Court will grant an injunction against a dissolution, if a sudden dissolution is about to be made in ill faith and would work irreparable injury.

What securities is a surety (paying the debt) entitled to have the benefit of, and what alteration in the law was made by the Mercantile Law Amendment Act, 1856?

Before this Act a surety was entitled to the full benefit of all securities taken by the creditor which were collateral to, or other than, the original principal security whereby the debt was evidenced. But by this Act it is enacted that a surety so paying the debt

shall be entitled to have assigned to him, or to a trustee for him, every security held by the creditor, whether such security shall or shall not be deemed to have been satisfied by payment of the debt, and shall be permitted to stand in the creditor's place.

Under what circumstances will a surety be discharged in equity from his liability?

If the creditor does any act affecting the surety, or omits to do any act or duty which he is required to do by the surety, or is bound to do, and that act or omission may prove injurious to the surety, or if the creditor enters into a binding stipulation with the debtor, unknown to the surety and inconsistent with the terms of the original contract, the surety is discharged. Thus, in the leading case of *Rees v. Berrington*, the obligee in a bond with a surety, without communication with the surety, took notes from the principal, and gave further time, and the surety was held to be discharged. (2 L. C. Eq., 2nd Ed. 814, *et seq.*)

MARSHALLING SECURITIES.

What is meant by the marshalling of securities?

By marshalling securities is meant that equitable doctrine by which if a creditor has a lien on, or interest in, two funds belonging to one person, and another creditor has a lien on, or interest in, one only of the funds, and the claims of both could not be satisfied if the former were to resort

to that fund in which alone the latter is interested, the latter creditor may compel the former to resort to the other fund in the first instance for satisfaction, whenever it will not operate to the prejudice of the party entitled to the double fund or to the common debtor.

Blackacre of the value of £10,000, and Whiteacre of £5,000 are mortgaged to A. to secure £7,500, B. has a second mortgage on Blackacre alone to secure £5,000. Will the Court aid B. to compel A. to realise his security in part against Whiteacre, and how?

Yes, equity will marshal these securities in favour of B., if this will not operate to the prejudice of A.'s rights or control his remedies.

DAMAGES AND COMPENSATION.

What is the general rule of equity in granting relief against penalties and forfeitures for breaches of covenant?

In *Peachey v. The Duke of Somerset*, the plaintiff was tenant of copyhold lands in a manor of which the defendant was lord. He committed acts of forfeiture by making leases contrary to the custom without license, and by felling timber, &c., and he now brought this suit offering to make compensation, and praying relief from the forfeitures; it was decided that the plaintiff was not entitled to relief, and that the true ground of relief against penalties is from the original intent of the case where the penalty is designed only

to secure the money, and the Court can give by way of recompence all that was expected or desired. (2 L. C. Eq. 2nd ed.)

In what cases will the Court now relieve against forfeiture of a lease for breach of covenant? By what statute was the jurisdiction enlarged? And state against what breaches of covenant the Court will not relieve.

The Court will relieve in cases of the breach of a covenant to pay rent or to insure against fire. The statute 22 & 23 Vict. c. 35, enlarged the jurisdiction of the Court to cases of non-insurance. If the forfeiture arises from any other covenant of a collateral nature, as to repair, equity will not relieve unless on the ground of accident, mistake, or fraud.

If a lessee holding premises under a lease containing a covenant by him to insure the premises with the usual clauses of forfeiture, should omit to effect a continuance of the insurance, and an ejectment be brought in consequence of such breach of covenant, will the Court in any, and, if so, in what, manner interfere to restrain the proceedings by ejectment?

The Court will relieve against the forfeiture if the omission to insure happened without gross neglect and fraud, and no loss by fire has occurred, and the premises are at the time of the application insured according to the covenant. Formerly the Court of Chancery would have granted an injunction to restrain the action of ejectment, but now the equitable right of

the defendant to relief may be relied on by him by way of defence to the action, and the Court may, if it think fit, direct a stay of proceedings. (Lynch's Statute Law, 1873, p. 17.)

ELECTION.

What is the doctrine of election?

Election is the choosing between two rights by a person who derives one of them under an instrument in which a clear intention appears that he should not enjoy both.

If A. by his will bequeaths B's property to C. and gives a legacy to B., can B. insist on being paid the legacy, and retain the property bequeathed by A.?

No, he must elect.

An estate is absolutely limited by settlement to a married woman in the event of her surviving her husband: the husband misconceiving his rights devises the estates to a third party by will, and by the same will bequeaths a legacy to his wife. On his death can the wife claim both her estate and the legacy, or what are the respective rights of the wife and devisee?

The wife cannot claim both her estate and the legacy, but will be put to her election; if she elect to keep her estate, the legacy given her by the will will be applied in compensating the disappointed devisee.

If a legacy is given on condition that the legatee shall not dispute the will, what will the Court decree?

That he will elect whether he will have the legacy or dispute the will.

If land be held on trust for sale and conversion into money, and distribution of the proceeds among A., B., & C., can they, or any one, or more of them, elect to take the land, or their shares of it, as realty?

A., B., and C. may jointly elect to take the land or their shares as realty, but one of them cannot elect without the others.

ADEMPMENT AND SATISFACTION.

What is an ademption of a legacy? Give an instance of ademption.

It is the taking away of a legacy, *i. e.*, if a testator after having given a legacy by his will, alienate the subject of it during his life, it is an ademption: as if the testator bequeath a specific legacy (a particular horse or ring) to a legatee, and afterwards part with the article bequeathed, the legacy is adeemed.

Explain the doctrine of "satisfaction" of portions and debts by legacies. Illustrate your answer by examples.

Satisfaction is the making of a donation with the express or implied intention that it shall be taken as an extinguishment of some claim which the donee has upon the donor, as if a portion is secured by marriage settlement or otherwise to a child, and the parent or

person standing *in loco parentis* afterwards bequeaths to the same child a legacy which is substantially the same in nature, amount, time of payment, &c., and be not given for a different purpose, it will (by implication) be a satisfaction of the portion, either altogether or *pro tanto*, according to circumstances.

If a debtor bequeath to his creditor a sum of money as great as, or greater than the debt, without taking any notice at all of the debt, this is deemed a satisfaction of the debt, so that the creditor cannot have the debt and the legacy. This doctrine is founded on the maxim *debitor non præsumitur donare*, a debtor is not presumed to give.

In what three classes of cases does satisfaction usually arise?

I. In cases of portions secured by a marriage settlement.

II. In cases of portions given by a will, and an advancement of the donor afterwards in the testator's lifetime.

III. In cases of legacies to creditors.

A father bequeaths to a child a legacy of £1000, and afterwards in his lifetime gives to the same child a portion of £1000; on the father's death, can the child claim the legacy, and would it be the same if the legacy was a gift of the residue only?

In the absence of evidence to the contrary the portion will be deemed a satisfaction or ademption of the legacy.

Is the ademption of a legacy applicable to strangers as well as to children?

Not of a general legacy unless under some peculiar circumstances; as where the legacy is bequeathed for a particular purpose and a portion is afterwards given by the testator by an act *inter vivos* exactly for the same purpose and for none other.

In *ex parte Pye* it was decided: (1) That as a general rule where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, he is understood to give a portion; and in consequence of the leaning against double portions, if the parent afterwards advances a portion on the marriage of the child, the presumption arises that it was intended to be a satisfaction of the legacy either wholly or in part; and this applies where a person puts himself *in loco parentis*: and (2) But no such presumption arises in the case of a stranger or of a natural child when the donor has *not* put himself *in loco parentis*, unless the subsequent advance is proved to be for the very purpose of satisfying the legacy; and therefore the legatee will be entitled to both. (2 L. C. Eq. 365.)

In what cases is a legacy in money to a creditor of the testator considered in equity to be an extinguishment of the debt?

When it is of equal amount to the debt, and in other respects equally beneficial, and there is an absence of countervailing circumstances on the prin-

ciple that a testator shall be just before he is generous. If, however, there is an express provision in the will for payment of debts this rule does not prevail; nor where the gift is of a residue, nor where the debt is a negotiable security.

In *Talbot v. The Duke of Shrewsbury* it was decided that if a debtor without taking notice of the debt bequeaths a sum as great as or greater than the debt to his creditor this is a satisfaction; but it is not a satisfaction if it is bequeathed as a contingency, or if it were less than the debt.

In *Chauncy's* case, the testator during his life, and before making his will, gave his servant a bond for £100. He afterwards made his will and bequeathed her £500, and *directed that all his debts and legacies should be paid*. It was held that the legacy was not a satisfaction of the debt because it was attended with particular circumstances varying it from the common rule, for the testator had directed that all his debts and legacies should be paid. (2 L. C. Eq. 379, 380.)

PARTITION.

What relief does the Court give where a joint tenant or tenant in common is desirous of having the joint property divided?

It decrees a partition.

INJUNCTION.

What is an injunction?

A judicial process whereby a party is required to do, or to refrain from doing, a particular thing.

Can any proceeding pending before the Supreme Court of Judicature in England be restrained by injunction?

It cannot; but every matter of equity upon which an injunction to restrain proceedings at law might formerly have been obtained, may be relied on by way of defence. (Lynch's Statute Law of 1873, p. 16.)

State in what cases the Court will interfere by way of injunction.

To prevent waste; the continuing of nuisances; pirating copyright; using trade marks; breaches of patents for inventions; publication of private letters; the sailing of a ship; to restrain the carrying on of a trade contrary to lawful covenants, &c.

When an injury to property is apprehended, will the Court assist, and how, and for what injuries will the Court apply a remedy?

It will assist by injunction; and thus apply a remedy for such injuries as are mentioned in the preceding answer.

State generally and briefly the grounds or principles on which the Court acts in granting injunctions.

The ground is that there is no other adequate

remedy, and that unless the Court interfered in this way an irreparable wrong would be done.

Has a party by whom private letters have been written and sent to another person any property, absolute or qualified, in the letters so sent as against the person receiving them? If so, under what circumstances, to what extent, and in what way, can he assert his title to this species of property?

The property which a receiver of private letters has in them is of a qualified kind, for the property beyond the purpose for which the letter was sent is in the sender. The Court will therefore restrain by injunction the publication of private letters, whether of a literary character or otherwise, where the publication is attempted without the consent of the author.

Is the time when the party applying for an injunction first became acquainted with the circumstances on which the application is founded material or immaterial? In either way of answering the question give the reason.

It is, because equity discountenances laches.

How does the owner of property acquire a right, as against an adjoining owner, to the enjoyment of light and air? Under what circumstances will the Court interfere by injunction to restrain any interference with such right?

He acquires the right by uninterrupted enjoyment for twenty years, unless the enjoyment arise by consent in writing. (2 & 3 Will. 4, c. 71, s. 3.) When

the right is indefeasible, equity will prevent any interference with such light and air which would *materially* injure the plaintiff, provided he has not acquiesced in the obstruction, or been guilty of laches.

Will the Court interfere to prevent the unauthorised use of trade marks, and in what cases, and what must the plaintiff prove in order to succeed? And what relief will the Court give?

The Court will interfere if a person has already acquired a reputation in trade by them; in fact, a property therein. The plaintiff must prove (1) that he has an exclusive right to the trade mark, and (2) that the defendant has *knowingly* used it so as to prejudice the plaintiff's custom and injure his business. The Court will then grant an injunction against the further unlawful use, and compel the defendant to account for all profits made thereby.

A. contracts with B., in general terms, that he will cease to carry on a trade, but subsequently violates his contract, has B. any remedy in equity? And give the reason for your answer.

B. has no remedy, because contracts in general restraint of trade are void as they tend to discourage industry, enterprise, and just competition.

What is waste, and what are the acts which constitute waste?

Waste is any spoil or destruction in houses, gardens, trees, &c., by the owner of a particular estate, to the prejudice of the expectant in fee. It is either (1) legal,

subdivided into (a) *voluntary* or *commissive*, or (β) *permissive* or *omissive*; and (2) equitable, which comprehends acts not deemed waste at the common law. Pulling down a house is voluntary waste, allowing it to fall out of repair is permissive. The cutting down of timber by a mortgagor is an example of equitable waste.

By the S. C. J. Act, 1873, an estate for life without impeachment of waste shall not confer upon the tenant for life any legal right to commit equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate. (Lynch's Statute Law of 1873.)

The Court will grant an injunction to restrain waste.

State some of the ordinary cases in which the Court will interfere to prevent the committing of waste.

The Court will restrain by injunction the committal of voluntary waste, as where a tenant for life pulls down buildings, or fells timber, or opens mines.

What is meant by equitable waste? Will a tenant for life, without impeachment of waste, be restrained from committing it?

Equitable waste is such injurious or wasteful acts as were not deemed waste at the common law; as felling ornamental timber; the Court will, by injunction, restrain a tenant for life from committing equitable waste.

Does an estate for life, without impeachment of waste, confer upon the tenant for life a legal right to commit equitable waste?

It does not, unless an intention to confer such right shall expressly appear by the instrument creating such estate.

Will the Court restrain a tenant for life, without impeachment of waste, from cutting down any and what timber; and supposing such tenant for life to cut down such timber, and to sell the same, to whom will the money produced by such sale belong?

The Court will restrain him from cutting down timber which is planted and grown for ornament or shelter of the property: this being termed equitable waste. If he should cut down such timber and sell it, the proceeds will belong to the remainderman or reversioner.

INFANTS AND LUNATICS.

What protection does the Court give to infants having property within the jurisdiction, and in what cases will equity deprive a father of the custody of his children, being minors?

It will appoint a suitable guardian where there is none other, or none other who will or can act; it will provide for the suitable maintenance and education of the infant out of his property; it will exercise a vigilant care over the conduct of the guardian, making it in all cases advisable for him to act under the strict guidance of the Court, and will prevent the infant's estate from being wasted. It will deprive the parent

of the custody of his children on proof of gross ill treatment, or that the parent is living in gross immorality, or otherwise acts in a manner injurious to the morals or interest of his children.

Can a father or mother appoint a guardian to their children ?

The father may, by 12 Car. 2, c. 24, whether the child be born or in *ventre sa mère* at the time of his death. A mother cannot, yet she may be appointed guardian.

What are the investments prescribed by the Lands Clauses Consolidation Act for the purchase money of the land of a party under disability, and how is it dealt with in the meantime ?

The money is to be paid into the Bank of England, and may be invested in the three per cent. consols, reduced annuities, or government or real securities. It ultimately may be applied in (1) redemption of land tax ; or (2) in paying off incumbrances on lands settled to the like uses as the lands sold ; or (3) in the purchase of other lands, to be settled to the same uses as the lands sold ; or (4) if paid in under this Act as the Court shall direct ; or (5) in payment to the person becoming absolutely entitled. (8 Vict. c. 18, ss. 69, 70.)

What rules does the Court observe regarding the enforcement of contracts entered into by infants or married women ?

An agreement entered into by parties incompetent to contract, such as infants and *femes covert*, will not

be enforced against them, nor will it be enforced in favour of such parties, because the remedy ought to be mutual. This rule is, of course, subject to the provisions of the Married Women's Property Act, 1870.

What is the origin of the Lord Chancellor's jurisdiction in lunacy, and how derived, and to what other judges has it recently been extended?

The sovereign, as *parens patriæ*, had from the first the care of idiots and lunatics who had no other guardian, and as the Chancellor is the person by whom the Crown exercises its powers, as keeper of the royal conscience and delegate of the Crown, the authority of the Chancellor is clearly derived from the Crown. By the stat. 14 & 15 Vict. c. 83, this jurisdiction is extended to the Lords Justices of the Court of Appeal, and the Judicature Act, 1873, does *not* vest this jurisdiction in the High Court of Justice, but allows an appeal from an order in lunacy made by the Lord Chancellor, or any other person having jurisdiction in lunacy, to be made to Her Majesty's Court of Appeal. (Lynch's Statute Law of 1873.)

To whom is the term "non compos mentis" applicable?

Not only to those who are idiots and lunatics, strictly so called, but also to all persons who from age, infirmity, or otherwise, are incapable of managing their own affairs.

In what cases will the Court interfere to carry into effect the contracts of lunatics?

Only where there is entire good faith, and the contract is for their benefit, as to provide them with necessities.

MARRIED WOMEN.

How are contracts treated that are made between husband and wife before and after marriage respectively?

The former rule was that at law such contracts made before marriage are generally extinguished by the marriage, and in equity also unless enforcing them would be furthering the manifest interest of the parties, as in the case of marriage articles: their contracts after marriage are at law a mere nullity, but under peculiar circumstances they are enforced in equity, as if the wife raises money out of her estate to answer the husband's necessities, she is entitled to be reimbursed out of his estate; but the S. C. J. Act, 1873, provides that when there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail.

If property be given to the separate use of an unmarried woman with a restraint against anticipation, will the separate use be enforced on her subsequent marriage against the husband and his creditors, and what will be the effect of the death of her subse-

quent husband on her separate use, and what the effect on it in case of her contracting a second marriage..

The separate use will be enforced against the husband and his creditors on her subsequent marriage.

The woman while single, and when, and as often as she becomes a widow, has the absolute dominion over the property; yet if she does not dispose of the property so as to put an end to the trust, and she marries again, the separate use clause and the restraint against alienation will be revived during such and every other subsequent coverture, so long as the property is held upon the original trust.

If a married woman entitled to pin-money permits her husband to receive it, can any, and if any, what arrears be recovered against the husband or his representatives?

The wife can only recover one year's arrears against the husband and his representatives, for the money is meant to dress the wife during the year so as to keep up the dignity of the husband and not for accumulation.

To what property acquired by the industry of a married woman is she entitled for her separate use?

The wages and earnings of any married woman acquired or gained by her after the 9th August, 1870, in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary artistic or

scientific skill, and all investments of such wages, earnings, money and property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone are a good discharge for such wages, earnings, money and property.

Can a married woman effectually assign or give security upon any property to which she will become entitled on the happening of a future event ?

She may by deed acknowledged by her in the manner required by 3 & 4 Will. IV. c. 74, the husband joining, whether such property be real or personal ; provided that as to the personal estate, it comes to the wife by an instrument executed after 31st December, 1857, and be not settled upon her as a provision for marriage, and there be no restraint (20 & 21 Vict. c. 57).

Can a married woman bind herself by contract in equity in any, and what case ?

She may bind her separate estate as mentioned in the preceding answer. In *Hulme v. Tenant* it was decided that the bond of a married woman jointly with her husband shall bind her separate property (1 L. C. Eq. 481).

What power has a married woman of dealing with property settled to her separate use ? Is there any and what distinction as regards her "pin-money" and other property ?

She may in equity dispose of real property settled to her separate use in fee, either by deed or will without

the concurrence of her husband. The pin-money not being an absolute gift, but only for the purpose of attiring the wife, &c., she cannot dispose of. Personal property settled to the separate use of the wife, may however be disposed of by her either by deed or will.

To what property acquired otherwise than by her industry is a married woman entitled for her separate use?

If married after 9th August, 1870, to any personal property to which she may become entitled as next of kin to an intestate, or to any sum of money not exceeding £200 under any deed or will; and to any realty, as heiress of an intestate, subject to any settlement affecting the same.

Is the separate property of a married woman liable for payment of her simple contract debts, and if so under what circumstances?

It is liable for all the debts (simple contract, or special), which she expressly charges it with, or with which, judging from the nature thereof, it may be fairly inferred that she intended to charge it. Hence, if she gives a promissory note to pay her own debt, without reference to her separate estate, it is a charge on her separate estate, because otherwise the security can have no operation: and property belonging to a woman married after 9th August, 1870, is liable to satisfy debts contracted by her before marriage (Lynch's Statute Law of 1870).

Is the testamentary disposition of a married woman

valid under any and what circumstances, and to any and what extent?

A testamentary disposition of personalty by a married woman is valid if made with her husband's consent, as he may waive his right to be her administrator. She may also make a valid will by custom, of her copyholds; or in pursuance of ante-nuptial agreement, or of a post nuptial agreement for consideration or by virtue of a power: and she may dispose of personalty actually given and settled or agreed to be given and settled to her separate use, whether it be in possession or in reversion, and this rule extends to savings out of her personal property. If she has a protection order or has been judicially separated from her husband, she may dispose of her property in all respects as if she were a *feme sole*: or if her husband has abjured the realm or been banished. If an executrix, she may by will devolve her representative character on another without the assent of her husband.

What is necessary to give validity to the will of a married woman.

If of personalty, the assent of the husband.

Can a married woman alienate a chose in action vested in her, and how and with any and what exceptions?

As a rule she cannot assign her *chose in action*, the act of marriage depriving her of this power. But if settled to her separate use or belonging to her by virtue of the Married Women's Property Act, 1870,

for her separate use, she may do so. So when she has been judicially separated, or, it seems, obtained a protecting order under the Divorce Act.

What is the meaning of a wife's equity to a settlement, and how enforced?

It is a right which a wife has in equity to have a settlement made upon her out of real or absolute personal estate (save a legal term for years) belonging to her which the husband cannot obtain possession of without the aid of the Court, and whenever the wife as defendant would be entitled to this equity she may enforce it as plaintiff by bill, as was decided in the leading case of *Lady Elibank v. Montolieu* (1 L. C. Eq. 341).

To what extent is this equity enforced by the Court against the husband and those claiming under him?

It is enforced not only against the husband but (out of the wife's immediate *choses in action* and immediate absolute equitable interest in chattels personal) also against his trustee in bankruptcy, and his assignees for payment of debts generally, and even against his specific assignees for value. There is this distinction between the case of the husband himself and his specific assignees for valuable consideration on the one hand and the case of his trustee in bankruptcy; in the former it is only necessary that the provision for the wife should commence from the death of her husband, in the latter it is necessary that the provision should commence immediately, because the

general assignment of his property renders him incapable for a time, and perhaps for ever of affording her a suitable support.

Will the Court require any settlement in favour of a wife out of property coming or bequeathed to her, and claimed by her husband, and if so, in what proportion to the amount of the legacy?

In such case equity will compel the husband to make a settlement upon the wife, and the proportion so settled is usually half of the property.

What protection does the Court afford to a married woman in respect of property belonging to her which the husband cannot reach without the aid of the Court?

It will enforce her equity to a settlement.

State some of the instances in which a wife's equity to a settlement may be lost or forfeited by her.

It may be lost or suspended by her own misconduct. Thus, if the wife (not being a ward of Court married without its consent) should be living in adultery apart from her husband, the Court will not direct a settlement on her own application; nor will the Court give the fund to the husband.

Suppose the husband to be a bankrupt, and the wife wishes to have the fund appropriated to her own benefit as far as may be, to what extent will the Court give effect to her wish?

The Court will decree the income of three-fourths, or three-fifths, or perhaps the whole fund, to be ap-

plied primarily to the maintenance of the wife during her life, and after her death the principal to be divided among the children ; because the husband in this event must remain for a time, and perhaps for ever, without funds to maintain his wife.

Are there any circumstances under which the rule which requires a settlement on the wife will be relaxed in favour of the husband ? If so, state how, and in what instances ?

Where the wife and children are already amply provided for by a prior settlement no further settlement will be required, and the wife may waive her right in open Court, or under a commission (unless she be a ward of Court married without its consent), and if the amount is under £200.

What amount of principal money, or of annual payment, will the Court pay to a married woman or her husband without order, and what evidence is required in support of the application ?

Not exceeding £200 in principal, or £10 annually, but if the wife chooses she may appear and insist upon her right to a settlement.

If the wife does not insist upon her equity, then, upon producing a certificate of the marriage verified by affidavit, a certificate of the fund in Court, and a joint affidavit of husband and wife that there is no settlement or agreement for a settlement whatever, the Paymaster-General will draw the cheque in favour of the husband.

A power of jointuring an intended wife, exercisable only by an appointor from time to time in receipt of the rents of a settled estate is exercised by one entitled to receive the rents, but not actually in receipt of them. Will equity in any and what circumstances uphold the jointure against the estate?

If the party afterwards actually come into possession equity will uphold the jointure.

A feme sole entitled to freeholds in fee simple, to chattels real and chattels personal, some in possession, some in reversion, marries without a settlement, which of these various kinds of property can her husband dispose of by act inter vivos without her concurrence, and which with, putting out of the question the wife's equity to a settlement?

The husband may without his wife's concurrence dispose of her chattels real, whether in possession or reversion and chattels personal in possession, for they are his by the marriage. The wife's freehold in fee, if not settled to the separate use of the wife, and reversionary interests in personal property may be jointly conveyed or assigned by her and her husband by deed acknowledged (see 3 and 4, Will. 4, c. 74; 8 and 9 Vict., c. 106; 20 and 21 Vict., c. 57).

When do the choses in action of the wife who survives her husband pass to the husband's executors?

When he has reduced them into possession in his lifetime.

At the time of marriage a wife is entitled to a

beneficial lease for years and she outlives her husband. Can the husband sell the lease during the coverture without her consent ; and if it is not sold, to whom will it belong on the death of the wife ?

The husband may, during the coverture, charge or dispose of the lease as he thinks fit, but he cannot bequeath it by will during the coverture. On the death of the wife surviving her husband, it will belong to her personal representatives.

If access to her infant children be refused to a mother by the father or guardian, will the Court interfere to any and what extent ; and if so, under what authority ?

The Court is empowered by 36 and 37 Vict., c. 12, upon the petition of the mother to make an order for the access of the petitioner to such infant or infants under the age of 16 years, at such times and in such manner as the Court shall think fit, and if such infant or infants be within the age of 16 years, may order them to be delivered up to, and remain in the custody of the mother until such age, and subject to such regulations as may seem just. (Lynch's Statute Law of 1873.)

ALIENS.

May an alien sue for any and what demands in the Courts of this country ?

It appears that since he may hold all manner of

property, he may also sue for any demands as a natural born subject. (Lynch's Statute Law of 1870.)

Is the right dependent on any and what circumstances ?

He must not be an alien enemy.

What limit is there to the right of an alien to hold real and personal property, and may a title be traced through an alien ?

Real and personal property of every description (except realty out of the United Kingdom and a British ship) may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural born British subject, and a title to real and personal property may be derived through an alien.

Can an alien enforce a trust in his favour relating to real estates or chattels real in England, or to personal estate ?

It is assumed that he can ; since the "Naturalisation Act, 1870," empowers him to hold real and personal property of every description as a natural born British subject : and before this Act the Court would enforce in favour of the Crown a trust of real estate for an alien. (*Sharp v. St. Sauveur*, L. R. 7, Ch. Ap. 343.)

SOLICITORS.

If one of a firm of solicitors be appointed and acts as trustee is he or his firm entitled to profes-

sional charges? Refer to any recent decisions on the subject.

The rule was that neither he nor his firm could charge for professional services, unless authorised by the instrument creating the trust, but this rule has been modified by recent cases. In *Cradock v. Piper*, it was held that one of several trustees being a solicitor may be employed by his co-trustees, and make the usual charges against them, provided the amount of the costs be not thereby increased; and in the case of *Clark v. Carlon*, it was decided by Wood, V. C., that where one of a firm of solicitors is a trustee, and he and his partner agree that the partner shall do all the work and have all the profits of the trust business, the partner may make and recover against the trust estate the usual professional charges. (15 L. T. Rep. 61 & 4; L. T. Rep. N.S., 361.)

Explain and illustrate the general principles on which the Court acts in adjudicating on dealings and transactions between a solicitor and his client.

Between solicitor and client entire good faith is required, and during the existence of that relationship between them there is a general inability to deal with each other. If a solicitor contracts with or takes a bond from a person who at the time is his client, he is subject to the *onus* of proving the perfect fairness of the transaction, and a gift made to a solicitor *pendente lite* will be set aside.

Have the town agents of a country solicitor any

and what lien upon the papers in their hands belonging to the clients of the country solicitor?

The town agent of the solicitor in the country has no lien for his general balance upon papers of the client which come into his hands, but he has a particular lien to the extent of his charges in the suit or matter in which he has been the agent for the country client.

What authority ought to be taken by a solicitor from his client for the prosecution or defence of an action?

The solicitor should be careful to obtain a written authority or retainer from his client to institute or defend the suit. But, although such authority may be by *parol*, yet, if so, and the authority is afterwards disputed by the client the *onus probandi* will lie on the solicitor.

Define the nature and extent of a solicitor's lien on the papers in his hands belonging to his client, and also of his lien on a fund recovered in a suit.

The former is merely a right to withhold the deeds, &c., until his costs are paid: it is only a passive lien. It prevails as against the representatives of the client, but is only commensurate with the right of the client: so that when a mortgage is paid off, the solicitor of the mortgagee cannot retain the deeds. But a solicitor has a lien on a fund realised in a suit for his costs of the suit or immediately connected with it, and this is a lien which he may actively enforce.

Can courts of justice give solicitors a charge for their costs upon the properly recovered or preserved by them?

Yes, unless the right to recover the costs is statute barred, and all conveyances to defeat such charge are void, except as against a *bond fide* purchaser for value without notice. (23 & 24 Vict. c. 127, s. 28.)

What is the rule with respect to the notice to the counsel, solicitor, or agent, being notice to the client or principal?

That it is good notice, since in each case it would be a breach of trust or confidence in the agent, solicitor, or counsel not to inform the principal or client. The notice to the counsel, solicitor, or agent, must, however, be in the same transaction or one closely followed by and connected therewith.

When a solicitor has carried on a cause up to a certain point, can he stay it unless the client furnishes him with money?

Yes: a solicitor is not bound to proceed without adequate advances from time to time by the client for expenses out of pocket.

What is the extent of a solicitor's lien on property of his client in his hands, and on a fund paid into Court in an action brought for his client by the solicitor?

He has a lien (which remains after his death to his representatives) for his general balance upon deeds or papers of his client (commensurate with the right of his client) which have come to his hands in the way

of his professional employment. By order of the Court or Judge, he has a lien or charge upon property recovered, or on a fund paid into Court in an action ; or upon money and costs ordered to be paid to the client for his taxed costs of suit.

Assuming a solicitor by negligence or unskilfulness so to mismanage his client's cause that it is lost, has such client any remedy by action against such solicitor ?

He may maintain an action against the solicitor if the cause were lost in consequence of gross negligence or gross ignorance.

What is the difference between the lien of a country solicitor, and that of his town agent, as to costs due from a client ?

The country solicitor has a lien upon all papers of the client in his hands, to the extent of the general balance due to him from the client for costs : thus, if he be conducting one cause for the client in the First Division, and another in the Third Division of the High Court of Justice, the client cannot get away his papers in the cause in the Third Division upon payment of the costs *only* of that cause, but must also pay the costs of that in the Third Division, and then he may have all his papers.

An agent to a country solicitor has no lien for a *general* balance upon any money of the client which comes into his hands, but he has a *particular* lien to the extent of his agency charges in that particular action.

Has a solicitor any lien upon a judgment, and if so, of what nature?

He has an active lien upon a judgment obtained by him for his client, and upon any money levied under an execution upon it, for his costs in the suit in which the money is recovered, and no set-off can be allowed to prejudice this lien.

What is necessary to be done by a solicitor before commencing an action to recover his costs?

He must, one calendar month before he begins the action, deliver, or send, to the party charged a bill of his fees, charges, and disbursements, signed by him, or enclosed in, or accompanied by a letter referring to the bill.

He may, however, set-off the amount of his bill of costs in an action brought against him by his client, although he has not delivered a bill signed a month before the action.

A Judge may give the solicitor leave to sue before the expiration of the month if the client is about to quit England.

CHAPTER II.

OF TORTS GENERALLY.

Is an infant liable for torts committed by him ?

He is, except for those arising out of contract.

An orphan of tender years has had his leg broken by wilful negligence. Can he bring an action for the injury, and if so, how, and what action ?

He may, by his next friend, bring an action which may be either trespass, or case; the former if the injury was directly and immediately occasioned by the negligence, the latter if it was not immediate, but only consequential. The form of action is of no importance.

A father and his child under ten years of age receive injuries by a collision on a railway; in seeking compensation at law for such injuries, must there be more actions than one, and in whose name or names is or are such action or actions to be brought ?

Two actions should be brought, the one by the father for compensation for his injuries, the other by the next friend of the child for compensation for the infant's.

What is necessary to support an action for fraudulent misrepresentation?

Proof that the representation is false and that to the knowledge of the person making it, that the person injured was induced by the false representation to contract, and that in consequence he has sustained damage.

In *Chandler v. Lopus* the defendant sold to the plaintiff a stone which he affirmed to be a Bezoar stone, but which proved not to be so. The action was brought upon the case, but it was held that no action lay against the defendant, unless he either knew it was not a Bezoar stone, or warranted it to be a Bezoar stone. (1 Sm. L. C. 165.)

In *Pasley v. Freeman* it was decided that a false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action on the case in the nature of deceit. In such an action it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is.

As to when a representation should be in writing in order to maintain an action against the party making it, see 9 Geo. IV., cap. 14, sec. 6. (2 Sm. L. C. 71.)

Is a master answerable for damages caused by the negligence or criminal act of his servant?

He is liable for the negligent act of his servant while performing his master's business, but not for the

criminal act of his servant unless he commanded or encouraged it.

Will the liability of the master, as stated in the preceding question, be altered by the injured party being also his servant? State the master's liability, and the reasons on which it is founded.

In this case the master would not be liable if the servant committing the injury were of competent skill and both were engaged in the course of a common employment. The reason being that the master has done his duty in selecting competent and skilful workmen, and there is no implied agreement by him not to expose his servant to extraordinary risks in his employment.

If a coachman negligently drives his master's carriage, and thereby injures another, when is the master liable?

The master would be liable if the negligence did not amount to a criminal act and the servant was upon his master's business.

Whilst A. is riding in his carriage, his coachman, in driving, knocks a man down and injures him. Upon another occasion, when A. is not riding in his carriage, his coachman does a similar thing: can the party injured bring an action of trespass against A. in both, or either, and which of these cases?

In the former case when the master was present trespass would lie, but not in the latter. The form of action is of no practical importance; and in the

latter an action could be brought against the master if the coachman was upon his business when he knocked the man down.

In the case of an injury to a person on the Queen's highway by job horses on a yearly hiring, not driven by the job-master's servant, who is liable for it?

The person hiring the horses: if the job-master's servant were driving the job-master would be liable.

In what way is a stage-coach proprietor liable to a passenger travelling by his coach, for hurt or injury?

He is liable to make good any injury the passenger may sustain by reason of the negligence or want of skill of the coachman, or by reason of any defect in the construction of the coach, or of the viciousness of the horses; but if the injury were the result of unavoidable accident he is not liable.

If a traveller by a railway sustain an injury on the journey, will he be entitled to compensation and against whom should he proceed?

If the injury was occasioned through the negligence, of the company's servants, he would be entitled to compensation, and should proceed against the company.

If A. sues for damage arising from the negligence of B., how may his right to recover be affected by his own want of care?

If A. contributed towards the accident by negligence or want of proper care, he would not be entitled to recover.

What was decided in the Six Carpenters' case ?

In this case six carpenters entered a tavern and were served with wine for which they paid ; they were afterwards, at their request, served with bread and more wine, for which they refused to pay. On these facts an action for trespass was brought against them, and the point of the case was whether the non-payment made the entry into the tavern tortious. It was decided that if a man abuse an authority given him by law, he becomes a trespasser *ab initio* ; but if the authority be given by the party and abused, then he is not a trespasser *ab initio*, but must be punished for his abuse. It was also held that non-feasance only cannot make the party who has the license by law a trespasser *ab initio*, and therefore in this case the mere non-payment did *not* make the carpenters trespassers *ab initio*. (1 Sm. L. C. 132.)

By 11 Geo. 2, cap. 19, a distrainer is not a trespasser *ab initio*, if *any* rent is due, although an irregularity may have been committed in levying the distress.

What is the difference between libel and slander ?

The difference is that libel, which is malicious defamation by writing, printing, or pictures, is punishable criminally and civilly, while slander, which is oral defamation, is punishable civilly *only* : also, that an action for libel must be brought within six years, for slander within two.

For what words may an action for slander be maintained ?

For all words imputing to another the commission of some crime punishable by law, such as, treason, murder, forgery, perjury; or words which may have the effect of excluding him from society, as to charge him with having leprosy; or words which may impair or hurt his trade, as to call a tradesman a bankrupt, a lawyer a knave, or a physician a quack.

A man commits an assault in the street, and in doing so breaks unintentionally a square of valuable plate glass in a shop window; another slips down accidentally and does the like. Has the owner of the glass a remedy at law against both or either of the persons?

In the first case, the shopkeeper has a remedy at law, in the second he has none; the reason being that in the former the injury was done by the man while committing an unlawful act, but the latter was an unavoidable accident.

If I start game in my own land, have I a right to follow it into the land of my neighbour?

I have not; but if I shoot game on my own land, and it falls dead on that of my neighbour, I may pick it up without committing a trespass in pursuit of game.

Explain the meaning of the maxim Actio personalis moritur cum personâ, and give an instance of its application.

A personal action dies with the person: as, if battery be done to a man, if he who did the battery, or

the other, die, the action is gone. There are by statute many exceptions to this rule of law.

Has any, and what, alteration been made in the above maxim by the 9 & 10 Vict. c. 93 (commonly called Lord Campbell's Act)?

Yes; by this Act, whenever the death of a person is caused by any wrongful act, or neglect, done under such circumstances as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages, then the person who would have been liable, if death had not ensued, is still liable to an action for damages, although the death has been caused under such circumstances as amount in law to felony.

In case of injury to a person from which death ensues, is there any mode by which compensation can be sought, and by what means, and by whom, and for whose benefit, and against whom, must it be brought; and under what circumstances, if any, can the person to be benefited sue in his or her own right, and what species of loss is recoverable in such an action?

As above seen, in such a case, an action for damages may be maintained for the benefit of the wife, husband, parent, and child of the person whose death has been caused (sect. 9). It is to be brought by, and in the name of, the executor or administrator of the deceased against the person who would have been liable if death had not ensued, and within twelve calendar months after the death (sect. 3). But by 27

& 28 Vict. c. 29, if there be no such executor, &c., or if one, and he does not sue within six calendar months after the death, the action may be brought by the persons beneficially interested. The loss must be that of some pecuniary advantages, either presently or in expectation. Damages are not to be given as a *solatium* to the feelings of the deceased's representatives or in reference to the loss of a legal right.

What relations besides father and mother does the word "parent" include in Lord Campbell's Act?

It includes "father and mother, grandfather and grandmother, stepfather and stepmother," and the word "child" includes "son and daughter, grandson and granddaughter, stepson and stepdaughter."

A. commits an assault upon B., and before action brought B. dies, can B.'s executors or administrators sue A. for the recovery of damages for the assault?

They cannot, unless B. died from the effects of the assault, and then they can under Lord Campbell's Act. *Actio personalis moritur cum personâ.*

State the exceptions to the maxim Actio personalis moritur cum personâ.

Trespass to the goods and chattels of the deceased; also the right to bring an action within one year of the death for injury done to realty within six months before the owner's death; also in cases coming within 9 & 10 Vict. c. 93.

In an action for an injury caused by the bite of a savage dog, what may the defendant put the plaintiff to prove in support of his action?

That the defendant was aware that the animal was savage, and did not take sufficient measures to prevent its doing mischief. If the dog bit sheep or cattle, the plaintiff is entitled to recover without such proof. (28 & 29 Vict. c. 60.)

State some of the nuisances affecting dwelling houses and lands for which an action will lie.

Setting up an offensive trade, as a tallow-chandler's, or maintaining an offensive thing upon the premises, as a dung-heap, the stench from which renders the air unwholesome, and the enjoyment of property uncomfortable; also for obstructing lights, or diverting water-courses.

When is a person liable as executor de son tort?

If a stranger takes upon himself to act as executor without any just authority (as by intermeddling with the goods of the deceased, and many other transactions) he is called in law an executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship without any of the profits or advantages; but the doing of acts of necessity or humanity, as locking up the goods or burying the corpse of the deceased will not amount to an intermeddling as will charge a man as executor of his own wrong. He is chargeable with the debts of the deceased, so far as assets come to his hands. He cannot bring an action

himself in right of the deceased ; but actions may be brought against him.

How should a person proceed for damages against a wilful trespasser, when they would not amount to £5?

Summarily before a justice of the peace ; on conviction the offender may either be imprisoned alone or imprisoned and kept to hard labour for a term not exceeding two months, or pay a sum not exceeding £5, and a further sum as compensation for the damage not exceeding £5, which, in the case of private property, is to be paid to the injured party. See also 28 & 29 Vict. c. 127.

May the owner of a horse which has been taken from him retake it in any and in what place?

He may retake it whenever he happens to find it, so that it be not done in a riotous manner, or attended with a breach of the peace, which retaking is termed *recaption*. But if a horse is feloniously stolen, it seems the owner may break open a private stable, or enter the grounds of another to retake it, if he has reason to suspect that it is there, but not otherwise.

A person is injured while travelling on a railway. State a case in which he has a remedy, and when he has none, against the company.

If the injury were occasioned by the negligence of the company's servants, as if, in consequence of the points being wrongly set, the train ran into a truck standing on a siding, the person would have a remedy against the company ; but if he contributed in any

way, as by getting out of the carriage while in motion, or the injury was the result of unavoidable accident, or of a latent defect in (for example) a wheel, which could not by ordinary diligence on the part of the company have been discovered, the person has no remedy.

CHAPTER III.

OF CONTRACTS.

BILLS OF EXCHANGE, PROMISSORY NOTES, AND CHEQUES.

Define a promissory note.

An unconditional promise in writing to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named or to his order, or to the bearer.

Define a bill of exchange.

An unconditional written order from A. to B, directing him to pay a sum of money therein mentioned to A. or his order, or to C., a third person, or his order.

What is the difference between an inland and a foreign bill of exchange?

Inland bills are such as are drawn and payable in the United Kingdom, the Isle of Man, Guernsey, Jersey, Alderney, or Sark, and adjacent islands, being part of the Queen's dominions. (19 & 20 Vict. c. 97, s. 7.) Foreign bills are such as are drawn abroad and payable here, or *vice versa*. A foreign bill must be protested if dishonoured, not so an inland bill; an inland

bill cannot be stamped after being drawn, but a foreign bill may.

If an infant join with an adult in a bill of exchange, can either be sued on the bill?

The adult may, but not the infant.

Describe the parties to a bill of exchange, and state their relative liabilities.

The acceptor is primarily liable and is the principal, all the other parties being merely sureties for him. But they are not as *between themselves* merely co-sureties, but each prior party is a principal in respect of each subsequent party. Thus, an endorser is considered as a new drawer, unless he qualify his endorsement, as by adding the words "without recourse to me."

The person who makes or draws the bill is called the *drawer*, he to whom it is addressed is before acceptance, the *drawee*, and after acceptance the *acceptor*; the person in whose favour it is drawn is the *payee*; if he endorse the bill to another he is called the *endorser*, and the person to whom it is thus assigned or negotiated, is the *endorsee* or *holder*, and so *ad infinitum*.

What is the effect as regards the liability of other parties of giving time to the acceptor of a bill of exchange?

It discharges them unless made with their consent.

If in a bill or note no time of payment be specified, when is it payable?

On demand.

Are days of grace allowed in the case of bills of exchange or promissory notes made payable at sight or on presentation?

No; by 34 & 35 Vict. c. 74.

Define a cheque?

It is, in effect, a bill of exchange drawn on a banker, payable to order, or bearer, on demand.

What is the effect of crossing a cheque, and what the effect of crossing it with the name of a banking firm?

The effect of simply crossing a cheque is to make it payable only to or through *some* banker. If crossed with the name of a banking firm it can only be paid to or through that firm. (19 & 20 Vict. c. 25.)

Is oral evidence admissible to make a promissory note absolute on the face of it, conditional or payable upon a contingency.

No, parol evidence cannot be given to vary or contradict a written instrument.

Is there any difference in the extent of the liability of an acceptor of a bill of exchange as between himself and third parties, and as between himself and the drawer?

No; unless there has been no consideration for the acceptance, then the acceptance being for the accommodation of the drawer, the acceptor is not liable to the *drawer*, though he is to parties who took the bill *bonâ fide*, and paid a valuable consideration for it.

A bill is accepted without consideration, and for the accommodation of the drawer. What facts must be shown to entitle the acceptor to set up this defence against a subsequent endorsee?

He should plead that the bill was obtained from him by fraud, and that the plaintiff gave no consideration for it, then proof of the fraud is held to throw on the plaintiff the onus of showing that he gave consideration for the bill.

What is the meaning of a bill of exchange being accepted per pro. ? and what is the consequence if this be done without authority?

Per pro. means by the procuration or agency of another, and the meaning of a bill of exchange being accepted *per pro.* is that it is accepted by an agent of the drawer who has an authority for that purpose; if accepted *per pro.* without authority it is a fraud in law, although done without a fraudulent intent, for which the agent is responsible. If the acceptance is fraudulent it is a felony.

To which parties to a bill of exchange or promissory note must notice of dishonour be given?

To all parties to a bill except the acceptor; and to all parties to a note of hand except the maker; the holder of a dishonoured bill should therefore give notice to the drawer and endorsers of it: and the holder of a note to the endorsers only.

Within what time ought notice of the dishonour of an inland bill, accepted for value, to be given to the drawer or endorser by the holder?

Where the holder and the party to whom notice is addressed live at different places, it is sufficient to send off notice on the day next after the day of dishonour. Where both the parties live in the same town, or where they live in London, notice must be given in time to be received in the course of the day following the dishonour.

By whom can a bill of exchange be accepted; and what constitutes acceptance of an inland, and what of a foreign bill of exchange?

A bill can only be accepted by the drawer competent to contract, and not by a stranger, except for honour. Acceptance in this country of bills inland or foreign, must now be in writing on the bill signed by the acceptor or his agent. (19 & 20 Vict. c. 97, s. 6.)

Which of the parties to a bill of exchange is primarily liable to pay it, and how is this liability affected by the bill being accepted for accommodation?

The acceptor; if he accepted the bill for the accommodation of the drawer, then in an action between the drawer and acceptor he is not liable.

If the acceptor of a bill of exchange refuse payment of it when due, is any, and what step necessary before you can sue the drawer or indorser?

Notice of dishonour must be given to all parties except the acceptor. There is no particular form of notice, yet it must import in express terms, or by necessary implication, that the bill (or note) *has been*

dishonoured. A written notice is not essential, but is advisable and facilitates proof.

A. takes a cheque of B. on his bankers, and cannot, without some inconvenience, present it for payment until some days after, and when he does so finds that the bankers have stopped payment in the mean time. Can he recover the amount afterwards against B.?

If a cheque be payable at a bankers in the place where the party receives it, it should be presented for payment during banking hours on the day after it is received. If it be payable elsewhere, it suffices to forward it by the regular post on the day after it is received, and the party receiving it by post has till the next day to present it; if this be not done, and the banker fails, the party guilty of the negligence will have to bear the loss. A bank note should also be circulated or presented within the same period.

A client brings an over-due bill of exchange to his attorney : give a detailed account of the steps that must be taken to enforce payment, and suggest any difficulties occurring to you that may arise as to its recovery : also some of the different ways in which the client might be holder.

The attorney should ascertain whether proper notice of dishonour has been given; if not, and one is requisite, he should give it, if not too late. The bill being over-due, the attorney should also inquire of his client whether he took it previously or subsequently to its becoming due; if he took it subsequently, he will hold

it subject to all the equities attaching to the bill. The client may be holder as drawer (being also payee), or as payee (not being the drawer), or as indorsee.

Can an action be maintained on a lost bill of exchange or promissory note, and can the plaintiff prevent the defendant from setting up the loss of the instrument; and if so, how?

Yes; by the 17 & 18 Vict., c. 125, the Court or a Judge may order that the loss of such instrument shall not be set up, provided that an indemnity is given to the satisfaction of the Court, or Judge, or a Master, against the claim of any other person upon such negotiable instrument (s. 87). If the bill or note be not negotiable, the loss of it is no defence to an action upon it, for no one can have a good title to it except the payee.

A promissory note is made payable to a husband and wife and the husband dies before it is paid, his wife surviving him. Can she maintain an action upon it?

The widow may sue upon the note; and if the husband should have joined with his wife in suing upon the note, and have died after judgment and before execution, the judgment would survive to the wife.

Is a tender after a bill of exchange becomes due a defence for the acceptor in an action by the indorsee?

No.

A promissory note is made payable to a woman before her marriage. She afterwards marries, and

the husband dies, leaving her surviving, can she bring an action upon the note?

If the note is not recovered upon during their joint lives it being a chose in action, reverts to the woman, and she may bring an action upon it.

How is the debt affected in law, when the payee of a promissory note dies, leaving the maker of the note his executor?

Formerly the debt would have been extinguished at Law, but not in Equity; now, however, this distinction does not exist, it being provided by the S. C. J. Act, 1873, that when there is (as in this case) a conflict between the rules of Equity and of Common Law those of Equity shall prevail.

If a bill of exchange is paid by one of the parties to it before it is due, and is allowed to remain in the hands of the indorsee, who indorses it away after the payment, can a subsequent indorsee for value recover from the party who has previously paid the bill?

Yes, if the indorsee took it *bond fide* and for value, but payment of a note payable on demand will be a defence against an indorsee for value without notice.

State in what particulars bills of exchange and promissory notes differ from other simple contracts?

They must always be in writing—they import a consideration, carry interest from the time they are due and payable, without a promise to pay interest, and they must always be stamped.

If A. guarantees the due payment of a bill of ex-

change, is A. liable for the interest if the bill be not paid at maturity?

Yes.

Where a bill of exchange is payable to bearer can a person who is holder for value sue upon it whether the party from whom it was taken had a title to it or not?

Yes, if the owner took it *bond fide* and for value before it became due; since in the leading case of *Miller v Race*, it was decided that the property in a Bank Note passes like cash by delivery, and a party taking it *bond fide and for value*, is entitled to retain it as against a former owner from whom it was stolen; and this case establishes the same principle in favour of all negotiable instruments. (1 Sm. L. C. 468.)

INFANTS.

For what debts is an infant liable? Does it make any difference if he is residing under the parental roof?

He is liable for debts incurred for necessities suitable to his station in life: if he reside with his parents, he cannot in general be made responsible for such debts.

Is a father liable for any debts contracted by his infant son?

He is not, unless there be some contract, express or implied, on his part to pay them.

How can a debt contracted during infancy, and not recoverable on that ground, be made binding on the party after he comes of age?

It may be made binding upon him if he promise after he is of age to pay ; but the promise must be in writing, and signed by him or his agent. (9 Geo. IV., cap. 14.)

Is an infant liable on a warranty of a horse sold by him if it prove unsound?

No; because it is a breach of duty arising out of contract.

Can a minor sue or be sued on breach of a promise to marry? State the reason for your answer.

He can sue but cannot be sued, because infancy is a personal privilege of which, as a rule, no one but he can take advantage : so if the parties to a contract be an infant and an adult, the latter is bound by, though the former may avoid, the contract. There are exceptions from this rule, as contracts for the public service, articles of apprenticeship, executed contracts of marriage, representative acts as executor and trustee, and contracts for necessities ; these are binding *ab initio* on the infant.

Can any other party to a contract, except an infant, take advantage of infancy to defend an action on the contract?

No ; because infancy is a personal privilege.

HUSBAND AND WIFE.

If a man marry a woman to whom he is indebted, and to whom he has given a security for the debt, what becomes of the debt and of the security: and how can this be prevented?

The debt and security are discharged by the marriage—to prevent this the debt should before marriage be assigned to trustees for the separate use of the wife.

When is a husband liable for the debts of his wife contracted during coverture, and upon what principle; and in what cases is he not liable?

He is liable when he has either impliedly or actually authorised her to incur debts; and therefore he is liable for necessaries suitable to his station in life, upon the principle that he impliedly authorises her to act as his agent, an implied authority which arises from the fact of their cohabitation. He is not liable to any particular tradesman to whom he has given notice not to trust her, unless she be living apart from him for no fault of her own, and he does not supply her with necessaries or means of obtaining them; neither is he liable if the wife depart from him against his will and without sufficient excuse, or if she is dismissed by him for adultery; nor if they are living separate and he pay her a sufficient sum for her maintenance, even if the tradesman did not know of such allowance.

In *Manby v. Scott*, a very old case which occurred in the reign of Charles II., it was decided that the wife's contract does not bind the husband unless she act by his authority. The two other leading cases upon this subject are *Montague v. Benedict*, and *Seaton v. Benedict*. The former of these was an action against a husband for certain goods—not necessities—delivered to the wife of the defendant, and it was decided that as the goods were not necessities, and there was no evidence to go to the jury of any assent of the defendant (the husband) to the contract made by his wife, the action could *not* be maintained. The latter was a claim for the price of certain goods which were in the nature of necessities, delivered to the wife of the defendant. It was shown that he had supplied his wife's wardrobe well with all necessary articles; and it was decided that a husband who supplies his wife with necessities in her degree is not liable for debts contracted by her without his previous authority or subsequent sanction. (2 Sm. L. C. 396, 429, 436.)

Against whom should an action be brought for a debt contracted by a married woman before her marriage; and state what restriction, if any, there is to the liability of a husband to the debts of his wife contracted before marriage. And what is the effect if she dies before action brought?

Against the husband and wife, unless the parties were married after 9th August, 1870, and then against the wife only whose separate property is liable to

satisfy the debt; formerly the husband was, *during coverture*, liable jointly with his wife upon all contracts entered into by her before marriage, but by the Married Women's Property Act, 1870, he is not (if married subsequent to the above date) liable. If the wife died before action, the husband was no longer liable. (Lynch's Statute Law, 1870.)

Upon what principle does the liability of a husband upon his wife's contract rest, and in what cases may a wife be regarded as the general agent of the husband?

Upon the principle that she is his agent, and she may be regarded as his general agent, for the purchase of necessaries suitable to her condition in life.

Does it make any difference or not as to the husband's liability for necessaries supplied to his wife, if he be an infant at the time?

It does not; he is liable, though an infant.

What rights as to property have been conferred by recent legislation upon wives deserted by their husbands, and how may they be secured?

By the Divorce Act, the wife may apply to a police magistrate (if one), or to justices at petty sessions, or to the Divorce Court, for an order to protect any money or property she becomes possessed of after such desertion against her husband and his creditors. And if the order be made, such money or property belongs to the wife, as if she were a *feme sole*. The order must, unless made by the Court, be entered within

ten days with the Registrar of the proper County Court. If the husband (or his creditors) seize and hold the property, after notice of the order, he is liable to restore the property, and pay double its value. (20 & 21 Vict. c. 85, s. 21.)

Is a wife's authority to order necessaries revoked by the death of her husband, although at the time of the order the wife and tradesman were ignorant of the death of the husband?

It is, since it is only on the presumption of his authority that she has power to bind him, which authority is revoked by his death.

When a husband wrongfully turns away his wife, and gives notice in the newspapers not to trust her, is he liable to tradesmen for necessaries supplied to her?

The husband is still liable; for the tradesman is considered as standing in the place of the wife, and enforcing indirectly her right to be maintained.

CONTRACTS.

State some of the maxims by which contracts are construed or expounded.

(1.) All contracts are construed according to the intentions of the parties. (2.) The construction should be liberal. (3.) It should be favourable. (4.) The contract should, in general, be construed accord-

ing to the law of the country where made. (5.) The construction is taken most strongly against the contractor or grantor. (6.) Oral testimony cannot be given to vary, but may to explain a written contract.

Name the contracts required by the fourth section of the Statute of Frauds to be in writing.

(1.) Where an executor or administrator promises to answer damages out of his own estate :

(2.) Where a man undertakes to answer for the debt, default, or miscarriage of another :

(3.) Where any agreement is made upon consideration of marriage :

(4.) Where any contract is made of lands, tenements, or hereditaments, or any interest therein :

(5.) Where there is any agreement that is not to be performed within a year from the making thereof: there must be some note or memorandum of the agreement in writing, signed by the party to be charged therewith, or his lawful agent, before any action can be brought upon the agreement.

When a simple contract is required by the Statute of Frauds to be in writing, or is reduced into writing by the parties, is it necessary that the consideration should appear on the agreement, or may it be supplied by parol testimony ?

It was decided, in *Wain v. Warlters*, that by the word "agreement" must be understood, not only the promise itself, but also the consideration for the promise ; so that a promise appearing to be without con-

sideration on the face of the written engagement was a *nudum pactum*, and gave no cause of action: the consideration cannot be supplied by parol testimony; but, in the case of a guarantee (19 & 20 Vict. c. 97, s. 3), a bill of exchange or promissory note, the consideration need not appear on the face of the instrument.

Can an action be maintained on a verbal contract for a year's service, to commence from a day subsequent to the making of the contract? Would it make any difference if the year were to commence from the making of the contract?

In the former case, no; because the contract cannot be performed within a year from the making (Statute of Frauds, sect. 4): in the latter case, yes; because the contract *can* be performed within a year. The leading case on this subject is *Peter v. Compton*, which was an action upon an agreement of the defendant in consideration of one guinea paid him, to give the plaintiff so many on the day of his marriage; the marriage did not happen within the year, and the question was whether or not the agreement must be in writing; it was decided that "an agreement which is not to be performed within one year from the making thereof" means, in the Statute of Frauds, an agreement which, from its terms, is incapable of being performed within the year, and, therefore, that the agreement in that case need not be in writing.

Can you question the legality of a consideration to a contract under seal?

You can ; because although a contract under seal is binding on the party making it, whether there be a consideration or not, yet it is liable to be impeached if founded on an illegal or immoral consideration, or obtained by fraud.

In the leading case of *Collins v. Blantern* the plaintiff sued on a bond executed by certain parties, of whom the defendant was one, the obligation of which was £700, conditioned for payment of £350. The defendant pleaded the following facts, which showed that the consideration, though not appearing on the face of the bond, was illegal; certain parties were prosecuted for perjury by one John Rudge, and pleaded not guilty. According to an arrangement the plaintiff gave his promissory note to the prosecutor, John Rudge, he to forbear further prosecuting, and, as a part of the arrangement, the bond on which the plaintiff sued was executed to indemnify him. The question was whether such a plea was good, and it was decided that it was, on the ground that illegality may be pleaded as a defence to an action on a deed. (1 Sm. L. C. 325.)

Will a moral obligation be sufficient to support an express promise where no legal liability ever existed?

No; the Court does not enforce a moral obligation where no legal liability ever existed.

Can money, won by a wager, be recovered in an action at law?

No; by 8 & 9 Vict., c. 109, s. 18. This does not extend to money subscribed or contributed for any plate or

prize to be awarded to the winner of any lawful game.

Can a contract between certain master manufacturers, whereby they mutually bind themselves to close their works at the will of a majority, be enforced? State the reason.

No; because it would be in restraint of trade and against public policy.

Are bonds, notes, or bills given to secure money lost at play at unlawful games altogether void, or may they be enforced under any and what circumstances?

Not altogether; they must have been given for an illegal consideration; in the hands of an innocent holder for value, without notice, they are good.

Under an agreement to perform one of two things, in whom does the right of electing what shall be done vest?

In the person promising.

If A. has covenanted to do one of two things, and the performance of one of them is rendered impossible by the act of God, is A. discharged from liability to do the other?

No; for the rule is that where a contract is in the alternative and one branch of the alternative cannot be performed, the promiser is bound to perform the other.

What is an estoppel? Give examples.

A conclusive admission which cannot be denied or contraverted. It is of three kinds: by matter of record, by deed, and *in pais*. Of the first a judgment in an

action *in rem* (which is a judgment pronounced on the status of some particular subject matter, as for the condemnation of a ship—the nullity of a marriage) is an example, and it is binding on the whole world ; of the second, the facts recited in a deed which no party thereto can deny ; and of the third, that a tenant cannot dispute his landlord's title.

How many descriptions of contracts are there ?

Contracts are divided into three classes :—(1) Contracts of record, such as judgments, recognisances, and statutes staple ; (2) specialities, which are under seal, such as deeds and bonds ; (3) simple contracts, or contracts by parol, that is either by word of mouth, or by writing not under seal.

Define a simple contract, and mention briefly what are its chief requirements irrespective of statute law ?

A parol agreement, either verbal or written, but not under seal. Irrespective of statute law, it must be made between competent parties upon a legal consideration, that is to say, one neither illegal nor immoral ; and there must be a subject matter, that is, something to be done or omitted.

What is the difference between simple contract and specialty debts ?

Simple contract debts are such as arise upon a simple contract, *i.e.*, one not under seal ; specialty debts such as arise upon a writing under seal ; the former must be founded upon a sufficient consideration, and do not when in writing (except bills of exchange and pro-

missory notes) import a consideration ; the latter are binding upon the parties thereto, though made without consideration ; an action on the former must be brought within six, on the latter within twenty years.

Has a specialty debt any priority over a simple contract debt in the respective events of the bankruptcy or the death, leaving an insolvent estate of the debtor ?

In neither event has it any priority : the distinction formerly existing in this respect in the case of death having been abolished by 32 & 33 Vict., c. 46, s. 1.

What is a bond ? Describe a common money bond.

A bond is a written acknowledgment, or binding, of debt under seal. A common money bond acknowledges that the obligor is bound to the obligee in *double* the amount of the debt, and a condition is annexed whereby the bond becomes void on payment of the sum really due with interest on a certain day.

How are contracts divided with reference to evidence ?

1. Contracts in writing, with respect to which parol evidence cannot be received to contradict, vary, add to, or subtract from, their terms ; and, 2, contracts under seal, which cannot be altered or the liability created by them, lessened or discharged by simple contracts.

Explain the meaning of the word " consideration " when applied to contracts. What contracts are called nuda pacts ? Is there any difference as to the liability on the latter species of contract when entered into by deed or by instrument not under seal ?

It means the price, motive, or matter of inducement of a contract, and it must be lawful in itself. A contract made without any consideration is termed a *nudum pactum*, if under seal a consideration is imported and the parties thereto are liable, but otherwise if it be only a simple contract, the maxim *ex nudo pacto non oritur actio* (an action does not arise from a naked contract) applying.

What is meant by the term privity of contract? and in what cases may the assignee of the lessor sue the assignee of the lessee?

Privity of contract is that relationship which exists between two or more contracting parties. It exists between lessor and lessee; but not between lessor and an assignee of the term; for here there is only a privity of estate. The assignee of the lessor may sue the assignee of the lessee on all the covenants *running with the land*, if there be any breach of such covenants by the latter while he remains in possession. The leading case as to covenants running with the land is *Spenser's case*, which was an action of covenant by the lessors of certain property against the assignees of the same, for not building a wall upon the property as the original lessee had covenanted to do. It was then decided, first, that where the covenant extends to a thing *in esse* parcel of the demise, the covenant is appurtenant to the thing demised, and binds the assignee without express words, as if the lessee covenanted to repair the house demised to him during

the term, but *not* so, if the thing is not in being at the time of the demise: secondly, that when the lessee covenants for himself "and his assigns" to do some act *upon the thing demised*, though not in existence at the time of the demise, there, forasmuch as it is to be done upon the land demised, that binds the assignee: and thirdly, that even though the lessee covenant for himself "*and his assigns*," yet if the thing to be done be merely collateral to the land, and does not in any way touch or concern the thing demised there the assignee cannot be charged. (1 Sm. L. C. 45.)

What is an executory contract?

An executory contract is where some future act is to be done; as when an agreement is made to build a house in six months.

CARRIERS.

State the instances, if any, in which a carrier is not liable for the loss of goods entrusted to him, and for what losses he is liable.

As a general rule a carrier is liable for all losses and damage to the goods entrusted to him, and his entire faultlessness does not excuse him; to this rule there are exceptions:—he is not liable for a loss arising from the act of God, or of the Queen's enemies. 1 Will. IV. c. 68, protects a common carrier by land from being

liable for any loss or injury to any gold or other valuable articles contained in any parcel, where the value exceeds £10, unless at the time of the delivery to the carrier their value and nature be declared, and an agreement made to pay the extra charge for them.

In what case is a common carrier liable for the loss of a package which he undertakes to carry gratuitously?

Although a common carrier for hire is an insurer of the goods he carries, the duties and liabilities of carriers without hire are only co-extensive with that of mandatory bailees. They are bound to employ only moderate or slight diligence, and are only liable for loss or damage occasioned by gross or culpable negligence. The leading case on this subject is *Coggs v. Bernard*, where the defendant had promised the plaintiff to take up several hogsheads of brandy then in a certain cellar and lay them down again in a certain other cellar safely and securely; and by the default of the defendant one of the casks was staved and a quantity of the brandy spilt. It was decided that if a man undertake to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for his pains. (1 Sm. L. C. 177.)

How should a person who has delivered goods to a common carrier to carry and deliver, but which have not reached their destination, proceed for the recovery of damages?

By action of *assumpsit* or on the case; *detinue* may be brought, and where the carrier has been guilty of a *misfeasance* which amounts to a conversion, *trover*.

Does the same liability for loss or injury extend to carriers by railway, or by water?

The liability of carriers by railway is regulated by the Railway and Canal Traffic Act (17 & 18 Vict. c. 31), by which the company is liable for loss or injury to cattle or goods occasioned by the neglect or default of the company or its servants, notwithstanding any notice, condition, or declaration by such company contrary thereto or in anywise limiting their liability. But they may limit their liability by express condition to be approved by the judge who tries the cause. No greater sum shall be recovered for a horse than £50, neat cattle per head £15, sheep and pigs £2 per head, unless when such cattle are delivered to the company they are declared to be of a higher value, in which case a higher rate may be charged for carriage. Special agreements are not affected by this Act. 1 Will. IV. c. 68, applies to railways.

At common law the owner of the ship is liable for any loss or injury unless arising by the act of God or the Queen's enemies, if this liability be not narrowed by the charter party or bill of lading. But by several statutes the owner or *master* is not liable for loss or injury occasioned by the fault of a qualified pilot where it is compulsory by law to employ such pilot. The owner of any sea-going ship is not liable for loss

or injury to goods on board arising from accidental fire; nor from robbery, &c., of precious articles, unless the owner in writing declares their nature and value at the time of shipment. Nor is the owner of any ship liable for accidental loss or damage to goods, &c., on board, to a greater aggregate amount than £8 per ton of the ship's tonnage.

INNKEEPERS.

Where a traveller is preparing to depart from an inn without paying his bill, may the landlord detain either his person or baggage until payment?

He has a lien upon goods entrusted to his care by his guest, and may detain them until his bill is paid, but he may not detain the traveller.

What is the law relating to the liability of innkeepers, and what is the leading case on the point; and how has this been affected by a recent statute?

By the common law innkeepers are bound to take not merely ordinary, but uncommon care of the goods, money, and baggage of their guests; and they are responsible for the acts of their servants and domestics, as well as for the acts of other guests. They are liable for the loss of or injury to their guest's goods unless lost or injured by the act of God or the Queen's enemies, or the fault of the guest or his servant.

The leading case on the point is *Calye's case*, in

which it was decided that if a man comes to a common inn, and delivers his horse to the hostler, and requires him to put him to pasture, which is done, and the horse is stolen, the innkeeper shall not answer for it; since, in order to charge the innkeeper, the goods lost or injured must be in the inn. (1 Sm. L. C. 105.)

The liability of innkeepers at the common law having been found to press hardly upon them, 26 & 27 Vict. c. 41, provided that no innkeeper should be liable to make good to any guest any loss or injury to goods or property brought to his inn (not being a horse or other live animal, or any gear appertaining thereto, or any carriage) to a greater amount than the sum of £30, except (1) where such goods or property have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper, or any servant in his employ: and (2) where such goods or property have been deposited for safe custody with the innkeeper. To take advantage of the Act, the innkeeper must exhibit the First Section in a conspicuous part of his house.

A traveller on his journey stops at an inn, and desires to put up for the night; the landlord, although he has room in his house, refuses to receive him. Is or is not the landlord warranted in so doing; and if not, has the traveller any, and what remedy against the landlord for such refusal?

The landlord is not warranted in refusing to receive the traveller, if he behaves himself properly, and is

not suffering from any infectious disease. The traveller's remedy would be by action on the case; and the innkeeper is liable to be indicted at common law.

LIENS.

What is a lien, and how does a general lien differ from a particular lien? Give instances of each.

A lien is a right in one man to retain that which is in his possession belonging to another until certain demands of the person in possession are satisfied. It is either *particular*, as a right to retain a thing for some charge or claim growing out of or connected with the identical thing; or *general*, as a right to retain a thing not only for such charges and claims, but also for a general balance of accounts between the parties, in respect to other dealings of the like nature. Of the former, a tailor's right to retain a coat till his charge for making it is paid, is an example; and of the latter an attorney's right to retain possession of *all* his client's papers until his general bill of costs is paid.

Is a workman who detains a chattel in exercise of his right of lien entitled to charge warehouse rent for keeping the chattel?

No; and if he demand rent for warehousing it, from that time he becomes a wrong-doer.

Has the agister of cattle any right or lien in the cattle agisted? State the reason.

No; because he does not work any improvement in them.

CHoses IN ACTION.

Describe the nature of a chose in action.

It is a thing of which a man has not the possession, or actual enjoyment, but has a right to demand by action or other proceeding. It is rather *in potentia* than *in esse*.

Can the assignee of a chose in action maintain an action on it in his own name?

He could not formerly, but it is provided by the S. C. J. Act, 1873, that any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a legal discharge for the same, without the concurrence of the assignor. (Lynch's Statute Law of 1873.)

In the case of an assignment of a mortgage, can

the assignee of the mortgage, in his own name, sue the mortgagor ?

If he has given express notice in writing to the mortgagor, he may sue in his own name, by virtue of the provisions of the S. C. J. Act, 1873.

A. enters into a bond with B. in the penal sum of £1000, conditioned for payment of £500 and interest ; B. assigns the bond to C. ; A. does not pay his bond, and it becomes necessary to sue him. In whose name should the action against A. be brought ?

The action may be brought in C.'s name, if he has given express notice in writing of the assignment to A.

A. effects a policy of assurance on his own life, and then assigns it to trustees. After A.'s death, it being necessary to sue for the amount of the policy, in whose name must the action be brought ? Will it make any difference if notice of the assignment be given to the assurance office ?

The action may be brought in the names of the trustees if notice of the assignment be given to the company, under 30 & 31 Vict. c. 144, and the S. C. J. Act, 1873. If notice be not given, the action must be in the name of A.'s executor.

In what respect is the law relating to choses in action altered by recent statutes ?

The 30 & 31 Vict. c. 144, enacts that the assignee of a policy of life assurance, and the 31 & 32 Vict. c. 86, of a policy of marine insurance, possessing at the time

of action brought the right in equity to receive and to give an effectual discharge to the assurance company liable under such policy for the money due thereon, is at liberty to sue at law in his own name. He must, however, give notice of the assignment to the insurance company.

And the S. C. J. Act, 1873, provides that any absolute assignment by writing under the hand of the assignor (not purporting to be by way of any charge only) of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor; but if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor, or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he is entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may,

if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.

Give an instance of a chose in action being reduced into possession by the husband.

If husband and wife sue jointly on a bond for a debt due to the wife *dum sola*, and recover judgment.

MASTER AND SERVANT.

Is a contract of hiring and service between master and servant dissolved by the death of the master?

Yes, being of a personal nature.

A servant's wages are payable quarterly, and have been paid to Lady-day, 1866. Between Lady-day and Midsummer, 1866, namely, on the 1st of May, the servant misconducts himself, and for such misconduct is turned away by his master without warning. Is the servant entitled pro rata to wages from Lady-day to May?

No; he will not be entitled to any wages from Lady-day to May. But the misconduct must be such as to justify the master in discharging him without notice.

A gentleman is in the habit of sending his servant to a shop and receiving goods on credit; the servant misapplies some of the goods to his own use. Has the

seller a remedy for the value of the goods so misapplied against the master? The same servant also obtains goods on credit in his master's name of a tradesman who had never before had dealings with the master, and takes the goods to his own use. Can the tradesman recover the value against such master?

In the first case the seller has a remedy against the master, as the servant would have had an implied authority to pledge his master's credit. But, in the second case, the seller would have no remedy against the master; the servant there having no implied authority to pledge his master's credit.

If a master is dissatisfied with his man-servant, and wishes to part with him, must he give him any, and what notice? And are there any circumstances which render a notice unnecessary?

He should give a month's notice. But if the servant wilfully disobey any lawful order, or unlawfully absent himself from work, or be guilty of moral misconduct, he may be discharged without notice.

THE STATUTE OF FRAUDS, AND LORD TENTERDEN'S ACT.

What are the requisites of the Statute of Frauds (29 Car. 2, c. 3) as to a sale of goods of the value of £10 and upwards, and how has this been affected by Lord Tenterden's Act (9 Geo. 4. c. 14, s. 7)?

The 17th sect. of the Statute of Frauds requires, in the case of a sale of goods for the price of £10 and upwards, in order to make the contract for sale good, that the buyer shall accept and actually receive part of the goods, or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing shall be made and signed by the party to be charged, or his agent thereunto lawfully authorised. Lord Tenterden's Act extended the provisions of this section to cases where the goods may be intended to be delivered at a future time, or may not at the time of the contract be in existence, or ready for delivery.

If a man buys and pays for a parcel of cotton, consisting of 100 bales, and another 100 bales, unselected out of 1000 bales, all of which are consumed by fire before delivery, on whom does the loss fall? Give the reason.

As regards the first purchase, the loss falls on the buyer, as the parcel being ascertained and distinguished at the time of the contract, the property therein immediately passed to the purchaser. But, in the case of the second purchase, something remained to be done, *i.e.*, to select and ascertain the 100 bales; and, therefore, the property in them did not pass to the purchaser, and the loss does not fall upon him.

If I give a verbal order for goods to the amount of £100 without receiving any part of them, or paying any part of the price, and afterwards refuse to receive

them, do I incur any liability? Give the reason for your answer.

No; as by the 17th sect. of the Statute of Frauds no contract for the sale of any goods, wares, and merchandise for the price of £10 and upwards is good except the buyer accept part of the goods sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of the bargain be made and signed by the party to be charged or his agent thereunto lawfully authorised.

Must a contract to purchase a horse be in writing? How would it be if a warranty were given with the horse, must that be reduced to writing?

If the value of the horse be £10 or more, the contract must be in writing; unless the horse has been delivered and actually received by the purchaser, or something be given to bind the bargain, or in part payment. The warranty need not be in writing unless the contract is.

When goods are sold on credit, and no time for their delivery is agreed upon, in whom is the right of property, and in whom is the right of possession immediately after the sale?

If the sale is of specific goods, and *nothing remains to be done* by the seller as between him and the buyer, before the goods purchased are to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller, and the buyer is

also immediately entitled to possession; but if any act remains to be done by the seller, then the property does not pass until that act has been done.

WARRANTIES.

Define a warranty and give an instance.

A warranty is a guarantee or security given on the sale of goods and chattels. It may be either *express* or *implied*. Every affirmation made by the vendor at the time of the sale in relation to the goods amounts to a warranty, provided it be so intended. A general warranty does not extend to patent defects, or to defects known to the buyer at the time. In many cases a warranty is implied; as, for example, when the goods sold are in the possession of the seller, he impliedly warrants his title to them; again, when goods are sold by sample, a warranty is implied that the bulk corresponds with the sample in nature and quality.

Is a warranty made subsequent to a sale valid or not? Give the reasons for your opinion.

It is not valid, because there is no consideration for it.

In an action on the warranty of a horse, would an implied warranty be sufficient upon which to maintain an action? Does a sound price amount to a warranty?

An implied warranty would not be sufficient to

maintain an action; it must be an express one. But if there be no express warranty, and a deceit is knowingly practised on the purchaser, the seller would be liable to an action on the case. A sound price does not amount to a warranty.

What remedies has the vendee of a warranted chattel on breach of warranty?

He may bring an action on the warranty, or use the breach in reduction of the vendor's claim; and if the article have not been completely accepted, but only received by the vendor, who has done nothing more than give it a fair trial, he may, on discovering the breach, return it.

PRINCIPAL AND AGENT.

What authority does an agent require to execute a deed for his principal so as to bind his principal?

He must be appointed by deed for that purpose. To this rule there is an exception, in the case of two joint contractors, one of whom, it has been held, may execute a deed for himself and the other without an authority under seal, provided he execute "for himself and the other, in the presence of that other." And although the agent of a corporation aggregate must be appointed by deed, yet certain agencies even for corporations may be done without an authority by deed.

What is the meaning of a del credere commission, and what liability does a factor incur by the receipt of a del credere commission?

Del credere, a phrase borrowed from the Italian, equivalent to our word guarantee or warranty, or the Scotch term warrandice, is an agreement by which a factor, when he sells goods on credit, for an additional commission, called a *del credere commission*, guarantees the solvency of the purchaser, and his performance of the contract. He is a mere surety, liable only to his principal, in case the purchaser makes default.

Is an agent's authority revocable after a part execution thereof by the agent?

No; except on payment by the principal of a compensation for the labour and expense which may have been incurred by the agent in the course of the employment.

When an authority is given to three persons, if one exercised the authority, would the principal be bound?

It would seem not.

If an agent agrees to act for a firm in partnership for a term of years, is the contract dissolved by the death of one of the partners during the term?

It is; and the contract having reference to the existing partnership only, the agent has no remedy against the surviving partner for not continuing the agency.

What is the extent of the authority which the master

of a ship has to bind his owners by contracts made by him during the voyage?

The master of a ship is the person intrusted with her care and navigation, and possesses what foreign jurists have called exercitatorial power over her. He may delegate his power, whenever it may be for the welfare of the ship, and the accomplishment of the voyage. He is the confidential servant or agent of the owners, and they are bound to the performance of all his contracts as to the usual employment of the ship. The master may hypothecate or pledge both ship and cargo for necessary repairs in foreign ports during the voyage.

Under what circumstances is a principal bound by the acts of his sub-agent?

He is not liable for the acts of his sub-agent, the agent having no right to delegate his authority. *Delegatus non potest delegare*; but if the principal ratify the acts of his sub-agent, and in some cases of tort, he is liable.

Who is the proper party to sue on a contract; the party with whom it is made or the party from whom the consideration moves? For instance, if a contract be made between agents for their respective principals, who can sue and be sued?

He from whom the consideration moves. If the principal is disclosed, he must sue upon it; if not disclosed, either he or his agent may sue. And as the principal can sue, he may, when discovered, be sued, although the agent contracted as principal.

In *Addison v. Gandasequi*, the defendant being abroad, and wishing to purchase certain goods, came to England, and went to his agents, who purchased the goods for him from the plaintiffs, he selecting them, but the plaintiffs debiting the agents with the price; it was held the plaintiffs could not now recover the price against the defendant, he having known who the principal was, and yet debited his agents. In *Thompson v. Davenport*, the plaintiff sold goods to one Mr. Kune, who told him he was buying them on account of another person, *but did not mention the principal's name*, and plaintiff did not inquire for it, but debited Mr. Kune. Mr. Kune failed, and plaintiff sued Davenport, who was the principal, for the price, and recovered; it being held that the seller might sue the principal for the price, he not having known who the principal was at the time. (2 Sm. L. C. 327.)

If A. be authorised to make a valuation of goods, is such valuation valid if made by A.'s clerk?

It is not, unless done with the sanction of the principal, or in accordance with the usage of trade.

In what cases is an agent liable on contracts entered into for a principal?

If he pledges his personal credit, conceals his principal, contracts as agent, yet in such terms as to bind himself, as if he covenanted for himself, his heirs, &c., and where he exceeds, or fraudulently misrepresents the extent of his authority. In *Paterson v. Gandasequi*, it was held, that if the seller, knowing at the

time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give credit to such agent, he cannot afterwards recover the value against his *known* principal; but if the principal be not known at the time of the purchase made by the agent, the principal, when discovered, or the agent, may be sued, at the election of the seller, unless when by the usage of trade the credit is understood to be confined to the agent so dealing, as particularly in the case of principals residing abroad. (2 Sm. L. C. 313.)

Would it make a difference as to the party to sue if the contract were under seal?

Yes; then the rule is, that only those who are parties or privy to a deed (*inter partes* relating to goods and chattels) can sue upon it. By the 8 & 9 Vict. c. 106, however, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture (sect. 5).

If a factor or agent sells goods for an undisclosed principal, in whose name may an action be brought for the goods? And what is the rule of set-off applicable in these cases?

The undisclosed principal or the factor or agent may sue. In *George v. Claggett*, it was decided that if a factor sells goods as his own, and the buyer does not know of any principal other than the factor, and the

principal afterwards declares himself, and demands payment of the price of the goods, the buyer may set-off any demand he have on the factor against the demand made by the principal. (2 Sm. L. C. 113.)

What is the main essential to the validity of a deed? In case of a deed made between A. and C. containing a covenant by C. to pay to A. moneys for the use of B. which of the two, A. or B., is the proper person to sue C. for the breach of covenant?

The main essentials are sealing and delivery. A. is the party to sue C., for only those who are parties to a deed relating to goods and chattles can sue upon it.

PARTNERS.

If A. lend to B. & Co. a sum of money upon a contract in writing that A. shall receive a rate of interest, varying with the profits of the trade carried on by B. & Co., or a stated share in such profits, will such loan constitute A. a partner with B. & Co.?

No; 28 & 29 Vict. c. 86, enacts, that this shall not of itself constitute the lender a partner with the persons carrying on the trade, or render him responsible as such; but in case the firm becomes bankrupt, the lender cannot recover any part of his principal, profits, or interest until the other creditors of the firm for value have been satisfied.

A. and B. are partners in trade; A. improperly

uses the partnership name by making a promissory note in the name of the firm, B. is compelled to pay the note. Has B. any and what remedy against A?

In this case B. would have a remedy against A. for money paid to his use.

Can partners sue each other at law, and for what claims?

As a general rule they cannot; but when an account has been taken, and a *final* balance struck, one partner may sue another for what appears due to him on such balance; or for debts due before the partnership; or for money received by one partner to the separate use of another partner, and wrongfully carried to the partnership account.

What will constitute a partnership with regard to third parties?

A mutual interest in the profits of any business carried on by two or more persons, or their appearing ostensibly as joint traders, will constitute them partners with regard to third parties; it may be mentioned that by 28 & 29 Vict. c. 86, money may be lent to be employed in a trade on the terms of the lender receiving a share of the profit, in payment of interest or otherwise, without constituting the lender a partner.

In *Waugh v. Carver*, certain ship agents at different ports entered into an agreement to have, in certain proportions, the profits of their respective commissions and the discount on the bills of tradesmen employed by them in repairing the ships consigned to them, and

it was decided that by this agreement they became liable as partners to all persons with whom either contracted as agent, though the agreement provided that neither should be answerable for the acts or losses of the other, but each for his own; for he who takes the general profits of a partnership must of necessity be made liable to the losses, and he who lends his name as a partner becomes as against all the world a partner. (1 Sm. L. C. 838.)

State the general rules regulating the liability of partners for the acts of each other.

In some cases of tort by one partner, the others would be liable, as damage done by running down a ship. But in no cases of fraud will the acts of one partner bind the others where there is collusion between him and the party with whom he deals. Each partner is the agent for the others, and as such may bind them in matters within the scope of the agency, which differs according to the species of partnership; thus, a partner may bind his firm by simple contracts in all matters incident to the business of the firm. As in a trading firm by bill, note, or receipt, but not so in a legal, medical, mining, or farming partnership; one partner may give a valid release by deed, but cannot in other cases bind the firm by deed except he have authority by deed for that purpose, nor by submission to arbitration.

MERCHANDISE AND SHIPPING.

What is meant by "stoppage in transitu," and how is the right lost?

Stoppage *in transitu* means stoppage *during the passage*, and is that right which an unpaid vendor of goods has in case of the vendee's insolvency—to stop them while on their way to him; if they once arrive at the end of the journey, and come into the actual or constructive possession of the vendee, the right is at an end; it may also be lost by negotiating the bill of lading with a *bond fide* indorsee: this stoppage is not a rescission of the contract, but merely places the vendor in the same position as if he had not parted with the goods; hence the vendor's right of lien on the part stopped is revested and no more. The leading case on this subject is *Lickbarrow v. Mason*. (1 Sin. L. C. 699.)

Give an instance of stoppage in transitu.

If a manufacturer of iron rails were to sell a quantity to a merchant, and after he had sent them off by rail were to learn that the merchant had filed a petition for liquidation by arrangement or composition with his creditors, he might stop the rails while on their way, and before they reached the actual or constructive possession of the merchant.

What is a charter-party, and what a bill of lading?

A charter-party is an agreement in writing by which

a ship owner agrees to let an entire ship, or a part thereof, to a merchant for the carriage of goods on a specified voyage, or during a specified period, for a sum of money, which the merchant agrees to pay as freight for their carriage. The word charter-party is derived from the Latin *charta partita*, a divided charter, because when notaries were less common there was only one instrument made for both parties, this they cut in two, and gave each his portion, joining them together at their return to know if each had done his part. A bill of lading is a memorandum signed by masters of ships, in their capacity of carriers, acknowledging the receipt of merchant's goods; of which there are usually three parts—one kept by the consignor, one sent to the consignee, and one preserved by the master. It is the evidence of the title to the goods shipped, and by its indorsement and delivery the transfer of the property in the goods is generally effected.

Who are the parties to sue and be sued on a bill of lading?

The party to sue is either the consignee of the goods, or the indorsee of the bill of lading; the party to be sued is the carrier.

How is the property in a British ship transferred from the vendor to the purchaser?

A registered ship, or any share therein, is transferred by bill of sale, containing a description of the ship, according to the form of the Merchant Shipping

Act, 1854, executed in the presence of, and attested by, one witness at least, and registered at the port at which the ship is registered. The transferee must make the necessary declaration, which is registered in like manner.

If there be two joint obligors in a bond, and one die, against whom should the action be brought ?

The action should be brought against the surviving obligor ; for it is a rule that, in case of a joint contract respecting personalty, if one of the parties die, his executor or administrator is at law discharged from liability.

A. and B., partners, bring an action for a client, C. ; when the cause is at issue A. dies, B. continues the action and fails, C. afterwards refuses to pay the costs incurred ; who should sue C. for the costs ?

B., the surviving partner, must sue C. for the costs.

Will a covenant not to sue given by one of two joint creditors operate as a release ?

No ; such a covenant cannot be pleaded in bar as a release of the joint action by both.

If a joint promise is made by A. and B. to C., who are all dead, leaving executors, who are the parties to sue and be sued ?

The executors of C. must sue the executors of the survivor of A. or B., and the executors of the one who died first cannot be joined ; for, as above stated, where there is a joint contract merely, and one of the contractors dies, the survivor is alone liable to be sued.

Define general average and particular average.

Average is a contribution which merchants and others make towards their losses, when they have their goods cast into the sea, for the safety of a ship, or of the other goods and lives of persons during a tempest. It is apportioned and allotted after the rate of every man's goods carried. So, if goods insured for a voyage reach their destination, but are in some degree injured by any of the accidents insured against, this is an *average loss*, and the insurers are bound to compensate the insured in the proportion which the average loss bears to the whole insurance. In this sense average is derived from the German, *haferei*, sea-damage.

General average is the contribution made by the parties to an adventure towards a loss, consisting in the sacrifices made, or expenses incurred by, some of them for the common benefit of ship and cargo.

Particular average is a loss borne wholly by the party upon whose property it takes place.

What is a bottomry bond? Define it.

It is a species of mortgage or hypothecation of a ship, by which her keel or bottom is pledged (*partem pro toto*), as a security for the repayment of a sum of money. If the ship be totally lost, the lender loses his money; but, if she return safely, he recovers his principal and interest.

A testator dies leaving a right of action for money due to him upon bond, and also a right of action for

libel or slander. Can his executors maintain an action in respect of both or either, and which of the above rights of action of their testator?

They may sue on the bond, but not for the libel or slander, because *actio personalis moritur cum persona*.

Can a person lawfully receive more than five per cent. interest, and if so, on what security?

He may upon any security, the laws limiting the amount of interest which might lawfully be taken having been abolished by 17 & 18 Vict. c. 90.

As a general rule should an action against a carrier for the loss of goods be brought by the consignor or consignee? And give instances of exceptions to the rule.

Generally speaking, the consignee is the proper plaintiff if the goods be lost, for the law presumes the contract for the carriage is between him and the carrier. But if the carrier is employed by the consignor, and the goods are at his risk, or if they are merely sent for approval, or the property therein has not passed to the consignee, or the consignor retains a special property therein, then the consignor should sue.

Mention some of the alterations in the law made by the Mercantile Law Amendment Act, 1856.

On the breach of a contract to deliver specific goods for a price in money, the jury, by leave of the presiding judge, may find what the goods are, and, by leave

of the court or judge, execution may issue for the goods on payment of the sum found to be due for the same (sect. 2). It is no longer necessary that a consideration for a guarantee should appear in the writing evidencing the guarantee, as was formerly necessary (sect. 3).

Merchants' accounts are now placed on the same footing, with respect to the time for bringing an action thereon, as other simple contract debts (sect. 8).

Absence beyond seas, or imprisonment of a creditor, is no longer a disability (sect. 10).

If one of several contractors is abroad, the statute now runs against those residing here; but a judgment obtained against those here, cannot be pleaded in bar to proceedings against those abroad when they return (sect. 11).

The provisions of the 9 Geo. 4, c. 14, ss. 1, 8, are extended to acknowledgments by duly authorised agents (sect. 13).

Part payment by one contractor, &c., is not to take a debt out of the statute against another co-contractor, &c. (sect. 14).

What is the law as to the payment of the debts of relations and third parties?

Precisely the same.

What is the law as to appropriation of payments? Thus, where a debtor pays money to his creditor, who has two distinct debts due to him, which of the two has the right to direct to which debt the payment shall be

applied? In the absence of any express appropriation how will it be applied?

The debtor has the first right of appropriating the payment, but if he neglects to do so, the creditor may appropriate it to which debt he pleases. It is not essential that the debtor should make an *express* appropriation at the time of payment; if circumstances show an intention to appropriate to a particular debt the creditor is bound thereby. If neither party appropriates, the law will do so to the earlier items of account.

What is the general common law rule as to interest on a debt in the absence of any express stipulation to pay it, and how may a creditor make his debt carry interest? How does the stat. 3 & 4 Will. 4, c. 42, affect this?

By the 3 & 4 Will. 4, c. 42, s. 28, a current rate of interest upon all debts or sums certain *may* be allowed by a jury to a creditor, from the time such debts or sums were to be paid if payable by a written instrument at a certain and specified time; but if not so payable then from the time a written demand for payment is made and notice given that interest will be claimed from then until payment. The general common law rule is that no contract is implied by the debtor to pay interest except in the case of bills of exchange, promissory notes, and money bonds.

A. orders goods of B. to be sent by a carrier C., who receives but loses the goods. A. refuses to pay for

them. What remedy have the parties, and against whom?

B. can compel A. to pay for the goods by action for goods sold and delivered, for after the delivery to the carrier the property in the goods passed to A. and the goods were at his risk. And he can sue the carrier for the loss.

When can the vendor of goods recover from the vendee interest on the price of goods sold?

Where there is an express contract to pay interest; or a notice given under 3 & 4 Will. 4, c. 42, s. 28, claiming interest; or if the goods are to be paid for by a bill at a certain date, and the bill is *not* given, interest on the price from the time the bill would have become due, is recoverable under the common count for goods sold and delivered, without such notice.

LANDLORD AND TENANT.

What are the quarter days of the year? How is a tenancy from year to year determined on either side? If a tenancy from year to year commence at Lady-day, 1857, when would it be determinable?

The quarter days are the 25th March (Lady-day), the 24th June (Midsummer-day), the 29th September (Michaelmas-day), and the 25th December (Christmas-day).

A tenancy from year to year can only be determined

by six calendar months notice being given to expire at the end of the current year's tenancy. Therefore, if a tenancy from year to year commenced on Lady-day, it must end on a subsequent Lady-day.

A house is let to a tenant for one year certain from the 1st January, 1860, and so on from year to year, as long as both parties please, what is the earliest day on which the tenancy can be determined?

The earliest time for determining the tenancy would be by giving notice on the 1st July, 1861, of the intention to quit on 1st January, 1862: because a lease for one year and so on from year to year as long as both parties shall please is a lease for two years certain.

Is it necessary that a notice to quit should in all cases be in writing?

No; a parol tenancy may be determined by a verbal notice to quit, but a written notice should be given, as it facilitates proof. So a written notice is essential in order to take advantage of the 4 Geo. II. c. 28, as stated *infra*.

If A. contracts with B. to grant B. a lease of certain lands, and A. refuses afterwards to grant the lease, what remedies has B. for such breach of contract?

B. may sue A. for breach of the contract in either assumpsit or covenant as the contract was not or was under seal. If he has paid a fine or premium he may sue A. for money had and received; or he may compel A. to perform the contract specifically.

A. lets premises to B. from year to year. B. under-lets these premises to C. ; to whom must A. give notice to quit in order to recover in ejectment ?

To B., not to C. the under-tenant.

At what time may a good notice to quit be given in the case of a monthly or weekly tenancy, respectively ?

A monthly tenancy may be determined by a month's notice to quit, and a weekly tenancy by a week's notice, expiring at the end of the month or week respectively ; but it is doubtful whether this notice is necessary in the case of lodgings.

If a house and stable are let from year to year under one letting, can the landlord give a valid notice to quit the stables only ?

No ; for a notice to quit a part of the demised property is bad.

Receipt for half-a-year's rent to Christmas last ; does it prove payment of the rent to the previous Midsummer ?

Prima facie it does ; but the landlord may give evidence to show the Midsummer rent was not paid.

At what time of the day, on which it is due, must rent be paid in order to prevent proceedings ?

Rent is not actually due until midnight of the day upon which it is reserved. The payment should however to prevent proceedings be made such time before sunset as to allow sufficient light to count the money.

A written notice to quit being given to a tenant by

his landlord, what liability does the tenant incur by holding over ?

He is liable to pay the landlord *double the yearly value* of the premises for so long a time as the same are detained, to be recovered by action of debt (4 Geo. II. c. 28). If the *tenant* gives the notice, which need not be in writing, and holds over, he is liable to pay to the landlord *double the rent*, to be recovered by action or distress. (See 11 Geo. 2, c. 19, s. 18.)

Must a lease for seven years be in writing ? and what is the limit of time for which a parol lease may be legally made ?

It must not only be in writing, but by deed (29 Car. 2, c. 3 ; 8 & 9 Vict. c. 106, s. 3). A parol lease, not exceeding three years from the making, with a rent of not less than two-thirds of the improved value is good. (29 Car. 2, c. 3.)

A. grants a lease to B. for twenty-one years at the rent of £100 per annum ; at the end of three years B. assigns the remainder of the term to C. subject to the rent ; after this assignment rent becomes due to A., who, not being able to obtain payment from C., calls upon B. to pay ; B. objects that he has assigned to C. Is B. liable to pay the rent ?

Yes, because on the execution of the lease to B. a *privity of contract* arises between him and the lessor which continues during the whole term.

What sort of annexation of a chattel to the freehold is necessary to constitute a fixture in its legal sense ?

The chattel must be fixed in the ground, or to some substance previously a part of the freehold ; for otherwise it does not cease to be a chattel and removable.

In *Elwes v. Maw* it was decided that tenants may remove fixtures erected for the purposes of their trades. (2 Sm. L. C. 221.)

If a landlord let a house on an agreement, and the tenant run away, leaving no sufficient property on the premises to pay the rent, how is the landlord to obtain possession so as to put an end to the agreement ?

If half a year's rack-rent be in arrear, the lessor should request two justices of the peace for the county, having no interest in the premises, to go upon and view the same, and affix upon the most notorious part thereof notice in writing on what day (at the distance of fourteen days at the least) they will return to take a second view thereof ; and if on such view the tenant does not appear to pay the rent, or there be not sufficient distress on the premises, then the justices may put the landlord into possession, and avoid the lease.

An occupier of two houses under two different landlords, one at a rent certain, the other without any agreement for any specific sum ; have the two landlords the like remedy for rent, or how does it differ ?

In the case where the rent is certain the landlord may distrain, in the other case he must sue the tenant for use and occupation.

If the original lessee covenant to insure against fire

but omits to do so, and he, by covenant, is further bound to uphold, and the premises are burned down, he having assigned, and the assignee will not reinstate, state whether the original lessee or the assignee is liable to do so.

The original lessee is bound to do so under his express contract; and so is the assignee of premises within the weekly bills of mortality, for the 14 Geo. 3, c. 78 (continued by the 18 & 19 Vict. c. 122), enables the landlord to have the sum insured employed in reinstating the premises. If the premises are not situate as above, it appears an assignee is not bound by a mere covenant to insure.

What fixtures may a tenant remove, and when must such removal be made?

He may remove such fixtures as he has himself put up, either for the purpose of trade, ornament, or furniture of his house, if thereby the freehold be not materially damaged. The removal must be either during the continuance of the term or at the end of it; for the tenant *cannot remove them after he has quitted the premises.*

By the 14 & 15 Vict. c. 25, s. 3, farming fixtures (erected at the tenant's own cost and with the landlord's consent, and not in pursuance of some obligation) may be removed by the tenant making good any injury to the premises, if on a month's previous notice in writing being given to the landlord he does not elect to purchase the same.

What is the usual remedy for recovering rent reserved on a lease, and how is it enforced?

A power of a re-entry is always reserved by the lease on breach of the covenant for payment, and ejectment may now be brought without a previous demand if half a year's rent is in arrear and no sufficient distress on the premises. The usual remedy is by distress; but the tenant may also be sued in debt or covenant, assuming there is the usual covenant in the lease to pay rent.

What constitutes a waiver of a proviso for re-entry?

If the landlord with full knowledge of the forfeiture which gave him the right of re-entry, accepts or distrains for rent due after the forfeiture, it will waive the forfeiture and right of re-entry.

In *Dumpro's Case* it was decided that where there is a covenant not to alien without license and that license is once given, the license applies to all future acts of a like nature, so that no alienation afterwards, though without license, is a breach of the covenant. This doctrine has been altered by recent legislation, 22 & 23 Vict. c. 35, s. 1, enacts that every such license shall, unless otherwise expressed, extend only to the permission actually given, or the actual matter thereby specifically ordered to be done, unless otherwise specified. (1 Sm. L. C. 30.)

23 & 24 Vict. c. 51, s. 6, provides that any actual waiver of a breach of covenant taking place after 23rd July, 1860, shall *not* be deemed to extend to any

breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

What repairs or dilapidations is a tenant from year to year liable to make good in respect of a mesuage so let to him?

It seems that he is only bound to make fair and tenantable repairs to keep the house wind and watertight, so as to prevent obvious waste or decay of the premises, and not to make substantial or lasting repairs, such as new roofing, or the like; and he is not liable for mere wear and tear of the premises.

If a landlord let a house by parol for three years, and nothing is mentioned as to repairs, state what repairs each party would be liable to do, and what would be dilapidations on the part of the tenant.

The lessor is not bound to repair the house, but the lessee ought to do so; for the law implies a promise by him to that effect, unless the house was in a ruinous state when he entered into possession. Voluntary waste, as removing doors or windows, would be dilapidations on the part of the tenant.

Is a landlord or incoming tenant, and which, liable at the expiration of a lease to pay the outgoing tenant in respect of manure, crops, &c., who holds under a lease; and what will be the difference if he be only a tenant at will?

If there are any covenants in the lease relating to

the manure, &c., both landlord and tenant will be bound by them; but if there be no contract, the parties will be bound by the custom of the country. The landlord is *prima facie* bound to pay the outgoing tenant, whether for years or at will, for manure, crops, &c., unless the incoming tenant, with the landlord's assent, enter upon them, for then the implied contract to pay rests with him. But if the tenant at will determine the tenancy *by his own act* he is not entitled to the crops. It was decided in *Wigglesworth v. Dallison* (1 Sm. L. C. 539) that a custom that the tenant of the land, whether by parol or deed, shall have the away-going crop after the expiration of the term is good, if not repugnant to the lease under which the tenant holds.

DISTRESS.

What is the meaning of a distress?

A taking, without legal process, of a personal chattel from the possession of a wrong-doer into the hands of a party grieved, as a pledge for redressing an injury, the performance of a duty, or the satisfaction of a demand. The word "distress" is derived from the Latin *distringo*, I bind fast.

For what are distresses usually taken?

For non-payment of rent, annuities, and rent-charges, rates and taxes, amerciaments in a Court Baron, penalties and tolls imposed by by-laws, and

under the Tithe Commutation Act, 6 & 7 Wm. IV. c. 71. Distresses are also made on cattle damage feasant.

How are distresses made ?

By the landlord or his agent entering the premises by day, and taking a portion of the goods in the name of the whole, or of so much as may be necessary; an inventory of the goods taken, and a memorandum of the charges must then be made and served on the tenant, with a notice of the fact of the distress having been made, and the time when the rent and charges must be paid, or the goods replevied,

At what time can a distress be made?

A distress cannot be made in the night, i.e., after sunset and before sunrise (except in the case of cattle damage feasant, otherwise they might escape), nor on the same day on which the rent becomes due, but must be made within six years of its becoming due.

Can an outer, or any, and what other door be broken open in order to make a distress ?

The outer door of the house can in no case be broken open, but if the outer door be open, the person distraining may justify breaking open an inner door or lock, to find any goods distrainable.

What things may be distrained, and what things are privileged from distress for rent ?

All chattels and personal effects found upon the premises may be distrained, whether they may belong to the tenant or a stranger. As to the goods of lodgers,

see *post*. The following things are privileged from distress:—(1) things in the personal use of a man; (2) fixtures, being part of the freehold; (3) things delivered to a man to be carried, wrought, or managed in the way of his trade; (4) perishable articles; (5) animals *feræ naturæ*; (6) goods *in custodia legis*; (7) cattle and goods of a temporary guest at an inn; (8) loose money; (9) instruments of a man's trade and profession, though not in actual use, if any other sufficient distress can be found; (10) beasts of the plough, instruments of husbandry, and beasts which improve the land, if any other sufficient distress can be found.

Are the goods of a guest at an inn liable to distress for the rent of the premises? State the reason.

See preceding answer. The reason is, that they are there by authority of law, the landlord being bound to receive the guest.

Must a bailiff have a written authority to distrain?

He need not, though it is advisable that he should.

When a landlord distrains for rent, after what time, and subject to what precautions, can he proceed to sell the goods distrained?

He cannot sell the goods until five days next after the distress is taken, and notice of the cause of the distress given. He is not bound to sell immediately on the expiration of the five days, but is allowed a reasonable time after for the appraisement and sale. Before sale, the goods must be appraised by two sworn appraisers.

Is the summary remedy of a landlord suspended if he take a note, bill, or bond?

No; because the rent is of a higher nature, and the acceptance of a security of an unequal degree is no extinguishment of the claim.

What is the remedy for a wrongful distress? If goods are illegally distrained for rent, what remedy has the owner of the goods: 1st, where no rent is due; 2nd, where only a small part is due?

The remedy for a wrongful distress are replevin; an action of trespass *de bonis asportatis*, or *quare clausum fregit*, for damages; an action of detinue, for the thing distrained itself, or trover for its value. All these remedies are available in the first case put in the question; in the second, which is an excessive distress, the proper remedy is a special action on the case founded upon the statute of Marlborough, 52 Hen. 3, c. 21.

State the principal irregularities in making a distress for rent, for which an action would lie.

The omission of any of the formalities in levying the distress required by 2 W. & M. sess. 1, c. 5.

If an *irregularity* occur in taking a distress, the distrainer is not now a trespasser *ab initio* if any rent is justly due. (11 Geo. 2, c. 19, s. 19. *Six Carpenters' case*. 1 Sm. L. C. 61.)

What do you understand by the expression "cattle levant and couchant?"

Cattle that have been so long in the ground of

another that they have lain down and risen to feed : supposed to be a day and a night.

In what cases may cattle be impounded, and, if impounded for an excessive sum, what are the remedies, and against the party impounding or the pound keeper ?

Cattle may be impounded on a distress *damage feasant*, and as stated *supra*. The action should be against the impounder, unless the pound keeper has done anything to render himself liable.

Can landlords distrain the property of a lodger or third person for rent due from their own tenants, and are there any exceptions ? Suppose they are implements of trade, how then ? And if they can, has the lodger any remedy against his landlord ?

As to implements of trade, see *supra*. The property of a lodger or third person may be distrained for rent due to the superior landlord. As to lodgers' goods, 34 & 35 Vict. c. 79, provides that when distress for such rent is levied upon the lodger's goods, he may serve the landlord, his bailiff, or other person employed by him to make the levy, with a declaration in writing, setting forth :—

(1.) That the immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained, or threatened to be distrained upon.

(2.) That such furniture, &c., is the property, or in the lawful possession of the lodger ; and,

(3.) Whether any, and what rent is due, and for what period, from such lodger to his immediate landlord.

A correct inventory, signed by the lodger, must be annexed to this declaration, of the goods referred to, and the lodger should pay to his superior landlord whatever rent is due from him to his immediate landlord; and this payment will be taken as a good payment from the lodger to his immediate landlord. If, notwithstanding his declaration, the superior landlord persist in distraining the lodger's goods, he may obtain from a justice of the peace an order for the restoration to him of the goods, and may also bring an action against the distrainer, in which action the truth of the declaration and inventory may likewise be inquired into. (Lynch's Statute Law of 1871.)

Under the Tithe Commutation Act, to whom is the tithe owner to apply in the first instance for his rent-charge; and, if not paid, what proceedings must he adopt, and against whom?

He applies to the tenant in possession. In case of non-payment by the tenant within twenty-one days after the rent-charge has become due, and after ten days' notice, the owner may distrain upon the lands liable for the arrears, and dispose of the distress, when taken, in the same manner as a distress for rent. If the rent-charge is in arrear for forty days, and no sufficient distress can be found on the premises, the owner may have a writ, directing the sheriff to assess

the arrears, and may afterwards sue out a writ of possession, and keep possession of the premises charged until the arrears and costs are fully satisfied. But no more than two years' arrears can be recovered at any one time, either by the distress or writ of execution.

GUARANTEES.

Describe the legal incidents of a guarantee.

It must be *in writing*, signed by the party to be charged or his lawful agent. It must contain a *promise* to pay and the name of the promiser.

In the leading case of *Wain v. Warlters*, it was held, that by the word "agreement" in the Statute of Frauds must be understood not only the promise itself, but also the consideration for the promise; so that a promise appearing to be without consideration on the face of a written agreement was *nudum pactum*, and gave no cause of action. But by 19 & 20 Vict. c. 97, although there must be a consideration for a guarantee, it need not appear on the instrument. (2 Sm. L. C. 221.)

A guarantee should be stamped if the principal contract requires a stamp.

In a guarantee on behalf of a third person, must any consideration be stated, and how and of what kind should it be?

Formerly a consideration must have appeared in the

writing, but it is not now necessary. (*Wain v. Warlters*, and the Mercantile Law Amendment Act.)

If a guarantee is given to several persons who are not themselves interested in the subject-matter of the guarantee, who must be the parties to sue on the guarantee?

If the persons to whom the guarantee is given are entire strangers to the consideration, the person from whom the consideration moves should be the plaintiff.

Must a guarantee for a third party be in writing, or will a verbal promise be sufficient?

It must, by the Statute of Frauds, 29 Car. 2, c. 3, s. 4.

Give an instance of how a surety for the payment of a debt due from a third party can be discharged from his liability by the conduct of the creditor.

By enlarging the time of payment by a binding contract which ties up the hands of the creditor, and prevents him from suing the principal debtor upon the original obligation, because the situation of the surety is varied and his liability prolonged beyond what was originally contemplated.

In what way, other than by a memorandum in writing, can a person render himself liable for the debts of another?

By accompanying another who orders goods, which the seller refuses to give the latter credit for, and the third party promises to pay for them, his verbal promise is sufficient to render him liable, the goods being

in fact, sold to the third party, although delivered to the other. But if the party who orders the goods be treated by the seller as the debtor, a verbal promise by a third party will not render him liable. The question is, *to whom was credit given?* and this must in general be decided by a jury.

A. B., in the presence of a witness, makes a representation concerning the character of a third party, upon which credit is given to the latter, such representation proving false, can an action be successfully maintained against A. B.?

No; 9 Geo. 4, c. 14, enacts, "that no action shall be brought to charge any person by reason of any representation or assurance made or given concerning or relating to the conduct, credit, ability, trade, or dealings of any other person, to the intent and purpose that such other person may obtain credit, money, or goods, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

Should you advise that an action would lie upon the following guarantee:—To A. B., I agree to pay for whatever goods you shall sell to C. D., in case of his making default in the payment thereof. E. F.

Yes; because there is a consideration and a promise.

What is the nature of a guarantee?

A guarantee is a promise to a person to be answerable for the payment of a debt or the performance of a

duty by another in case he should fail to perform his agreement. In *Birkmyr v. Darnell*, it was decided that a promise to answer for the debt, default, or mis-carriage of another person, for which that other remains liable, is within the Statute of Frauds, but *not* if that other does not remain liable. (1 Sm. L. C. 224.)

CHAPTER IV .

OF PROPERTY.

THE SUBJECTS OF PROPERTY.

Define the several kinds of property according to the English law.

The subject of property (in the law of England called *things*, as contradistinguished from persons) are distributed into two kinds, things real and things personal.

What is the distinction between real and personal property ?

Things real, otherwise called realty, consist of things substantial and immovable, and of rights and profits annexed to or issuing out of them.

Things personal, otherwise called personalty, consist of goods, money, and all other movables, and such rights and profits as relate to movables.

If certain lands be conveyed to a purchaser, and no notice be taken in the conveyance of any buildings upon, or mines or minerals under the land, would such buildings, mines, or minerals pass to the pur-

chaser? *State any legal maxim applicable to the question.*

Land, in its legal signification, has an indefinite extent upwards as well as downwards; and therefore, if certain land be conveyed to a purchaser, any buildings upon, or mines or minerals under, the land will pass with it, though not expressly noticed; the maxim is "*Cujus est solum ejus est usque ad cælum et ad inferos,*" or as the same maxim is sometimes more elegantly expressed "*cujus est solum ejus est altum.*"

Suppose A. grants a piece or pool of water to B., what is the extent of B.'s estate therein? What words should be used to assure the freehold of it to the purchaser?

If A. grants a piece of water to B., B. will take no estate in the soil, he will only have the right of fishing in the water. In order to pass the freehold in the soil, it should be conveyed as so many acres of land covered with water, but by the grant of a "pool," both the land and water will pass.

What do you understand by the word "hereditament," and what will pass by it in a deed?

An hereditament is by much the largest and most comprehensive expression that can be used, for it includes not only lands and tenements, but whatever may be *inherited*, be it corporeal or incorporeal, real, personal, or mixed. Thus, an heir-loom or implement of furniture, which by custom descends to the heir together with the house, is neither land nor tene-

ments, but a mere movable, yet being inheritable is comprised under the general word hereditament; and so a condition, the benefit of which may descend to a man from his ancestor is also an hereditament.

Of what do corporeal hereditaments consist?

If the word hereditament is applied to realty only (which is its most ordinary use), corporeal hereditaments are the same as land.

What are chattels personal?

Things personal are called chattels personal, in contradistinction from chattels real; and, as before stated, consist of *movables*, and the rights connected with them.

What is necessary to make a gift of furniture valid?

It must either be accompanied by delivery of possession, in which case no deed or writing is required; or it must be by deed.

What is a chose in action, and to what description of property is the term applied?

A chose in action is a thing of which a man has not the enjoyment (either actual or constructive), but which he has merely a right to recover by action.

Can a chose in action be legally assigned, or by what mode is the transfer of such property effected?

Formerly a chose in action could not be assigned at law, with the exception of bills of exchange, promissory notes, bail bonds, and life and marine policies. The form of assignment, therefore, was in the nature of a declaration of trust, and an agreement to permit

the assignee to sue in the name of the assignor to recover possession ; but Courts of Equity allowed the assignment of a chose in action as freely and directly as choses in possession ; and now, by the S. C. J. Act, 1873, it is provided that any absolute assignment by writing of any debt, or other legal chose in action, of which notice is given to the debtor, &c., shall be effectual in law to pass the legal right to such debt from the date of such notice, and all legal remedies for the same. (Lynch's Statute Law of 1873).

Is it absolutely necessary on the assignment of a chose in action at law that a power be given to the assignee to sue in the name of the assignor, and what would be the consequence if this power were omitted ? Would the power pass by a subsequent assignment ? Does the same rule apply in equity ?

Formerly it was necessary to give such a power, and if it were omitted the assignee could not recover the chose in action ; but the assignor could, subsequently to the assignment, give the assignee a power to sue in his name. In equity, as before-mentioned, no such power was required ; and, since the S. C. J. Act, 1873, it is not required at law.

How can the right to a sum of money owing be transferred by the creditor to a third party ? And what are the forms attending such transfer, and what precautions are to be taken by the purchaser to guard his title on the transfer being completed

as distinguished from a transfer of an estate in land?

A debt, or other chose in action, can, since the S. C. J. Act, 1873, be assigned directly by any writing, so as to give the assignee the legal right to it, and all legal and other remedies for the same. Notice must be given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, and the assignment will only take effect from the date of such notice.

What is the meaning of the word "emblems?"

Emblems are the growing crops of those vegetable productions of the soil which are annually produced by the labour of the cultivator. They extend not only to the corn sown, but to roots planted, or other annual artificial profit; but not to fruit trees, grass, and the like, which are a permanent or natural profit of the earth. They are a *mixed* subject of property, for although in unison with the soil, and therefore coming within the general definition of things real, they follow nevertheless in several particulars the nature of personal estate, for they descend to the executor or administrator, and not to the heir of the deceased owner.

When is real estate considered as personal, and personal as real?

Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property

into which they are directed to be converted, and this in whatever manner the direction be given, whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed or only agreed to be conveyed. So real estate purchased with partnership capital for the purposes of partnership in trade is considered as personal estate.

Should the direction to sell an estate be absolute or discretionary in order to constitute an equitable conversion of freehold into personalty?

The direction to convert must be *express* and *imperative*, for if merely discretionary or optional the property remains in *statu quo*.

If real estate be purchased of partnership funds, is it treated as real or personal estate in any and what respects?

If purchased for the purposes of the partnership it is considered as personal estate, and will be distributable and disposable accordingly. Therefore on the death of one partner there is no survivorship, but his share will go to his personal representatives.

State the principal distinctions in the mode of the devolution of real and personal estate on the death of the owner intestate.

Real estate descends to the heir-at-law. Personal estate is distributed amongst the next of kin of the deceased, as to which see *post*.

TENURES.

State the ordinary tenure of land.

There were formerly three kinds of lay tenure distinguished by the nature of the services under which the tenants held, *viz.*, Knight service, Free Socage, and Copyhold. The first of these was abolished by 12 Car. 2, c. 24, the two last subsist to this day. Free socage, or freehold, comprises three varieties, *viz.*, petit serjeanty, tenure in burgage, and gavelkind. Copyhold includes two, *viz.*, ancient demesne and customary freehold. Besides these *lay* tenures there is another species of tenure of a *spiritual* nature called tenure of frank-almoigne.

What is Borough-English tenure ?

It is socage tenure, subject to the custom of Borough-English—a custom which prevails in several cities and ancient boroughs. Its chief feature is that the land descends to the youngest son in exclusion of all the other children. In some places this peculiar rule of descent is confined to the case of children, in others the custom extends to brothers and other male collaterals.

To whom will land held according to the custom of gavelkind descend, and in what part of England does this custom more especially prevail ?

The land descends not to the eldest, youngest, or

any one son only, but to all the sons together. It occurs as of common right in the county of Kent, almost the whole of which is subject to this tenure. It is to be found also in some other parts of the kingdom.

A man having had two sons, the eldest of whom died before him leaving two sons, dies intestate, seised in fee of gavelkind lands, leaving issue the two grandsons (sons of his eldest son) and his second son : state the proper parties to convey to a purchaser.

The son and two grandsons must convey, as by the custom the lands descend to all the sons equally ; and if any be dead his representatives will stand in his place.

What are the principal distinguishing features of tenure in gavelkind ?

(1.) The tenant is able to alien his estate by feoffment at the age of fifteen. (2.) The estate did not escheat in case of an attainder for felony, the maxim being "father to bough son to plough." (3.) The tenant could always dispose of his lands by will. (4.) The peculiar mode of descent. (5.) The widow is entitled to one moiety of the land as tenant in dower, but only while she remains chaste and unmarried. (6.) The husband is entitled to curtesy whether there is issue or not, but only of a moiety, and this ceases on his marrying again.

Explain the origin of copyholds, and by what statute was the further creation of manors prohibited ?

Copyhold tenure sprang from the ancient tenure of villenage. Villeins were the bondmen of the lord of the manor, of whom they held small portions of land, by way of sustaining themselves and families, and for which they had to perform services of the basest kind. At first they held at the mere will of the lord, who might at any time dispossess them, but in process of time they acquired a customary right, which the lord could not defeat; and now, although a copyholder is still said to hold his lands at the will of the lord, yet it is at such a will only as is agreeable to the custom of the manor.

The further creation of manors was prohibited by the statute *Quia emptores*, 18 Edward I. c. 1.

Describe generally the nature of customary freeholds.

Customary freeholds are a peculiar species of copyhold still existing in many parts of the kingdom. The lands are held according to the custom of the manor, but not at the will of the lord. As in the case of pure copyhold, the freehold is in the lord, and also the right to mines and timber, and the tenants cannot grant leases without the lord's consent.

FREEHOLD ESTATES OF INHERITANCE.

Mention the different senses in which the terms "estate" and "freehold" are used in connection with real property, and the meaning of each.

An *estate* in lands signifies such interest as the tenant has therein. It is called in Latin, *status*; signifying the condition or circumstances in which the owner stands with regard to his property. It may be considered with regard to (1) the *quantity of interest*; (2) the *time* at which that interest is to be enjoyed; and (3) *the number and connection* of the tenants. Estates may also be legal or equitable.

As to freeholds, see *post*.

What are legal and what equitable estates?

Legal estates are those which formerly were properly cognizable in the Courts of Common Law, though noticed also in the Courts of Equity.

Equitable estates are those which were recognised only in the latter courts, and not even noticed, generally speaking, in the former. Now it is provided by the S. C. J. Act, 1873, that the High Court of Justice and Court of Appeal shall take notice of all equitable estates and rights in the same manner as the Court of Chancery would have recognised them, and subject thereto shall also fully recognise all legal estates (sec. 24). The effect of this provision will be, that the owner of the legal estate will, as formerly, have the right and power to receive the rents and profits, and the owner of the equitable estate will be entitled to the beneficial interest in or ownership of the property, unattended, as formerly, with the possession or actual ownership thereof.

Define the several kinds of estates with regard to their quantity of interest, stating which arise by operation of law.

With regard to the *quantity* of interest, the primary division of estates is into (1) freeholds, and (2) less than freeholds. Freehold estates are either (a) of inheritance, *viz.*, estates in fee simple or fee tail, or (b) not of inheritance, *viz.*, estates for life, and *pur autre vie*, tenancies in tail after possibility of issue extinct, and estates by curtesy and dower. The last three arise by operation of law. Estates less than freehold consist of estates for years, estates at will, and at sufferance.

What is an estate of freehold ?

It is an estate either of inheritance or for life in lands of free tenure, and at common law could be created or transferred only by the ceremony of livery of seisin, attended with proper words of donation.

What is the largest and what is the smallest estate of freehold of which a man can be seised ?

An estate in fee simple is the largest, and an estate for life the smallest.

Describe an estate of inheritance, and state the different kinds.

An estate of inheritance is where the tenant is not only entitled to enjoy the land for his own life, but where after his death, without having disposed of it, it is cast by the law upon the persons who successively

represent him *in perpetuum* in right of blood, according to a certain established order of descent.

An estate of inheritance is called a fee, and is either an estate in fee simple or fee tail.

What is an estate in fee simple?

An estate in fee simple is that which a man hath to hold to him and his heirs general—that is, his heirs both lineal and collateral, male and female. This is often called an “estate in fee,” without the addition of the word “simple,” though, as already explained, a “fee” more properly signifies an estate of inheritance.

Who is a tenant in fee simple?

One who holds to him and his heirs. (See last answer.)

What words will create or pass a fee simple estate in a will or in a deed respectively?

In the case of a deed, the word “heirs” is necessary in order to make a fee or inheritance, for if the land be given to a man for ever, or to him and his assigns for ever, this vests in him but an estate for life.

This rule has, however, never been held to extend to dispositions by *will*, in which a more liberal construction has always been allowed: and therefore, by a devise to a man for ever, or to one in fee simple, or with other words of perpetuity indicating the testator's *intention* to pass the fee, the devisee has always been construed to have an estate of inheritance; and now, by 1 Vict. c. 26, s. 28, where any real estate is devised *without words of limitation*, it shall be construed to

pass the fee simple, or other the whole interest of which the testator had power to dispose, *unless* a contrary intention shall appear by the will.

Into what sorts are estates in fee simple divided ?

Estates in fee simple are divided into three sorts :

1. Fee simple absolute—*i.e.*, one that is free from all qualification ; 2. Fee simple qualified—*i.e.*, one which, having a qualification subjoined thereto, must be determined whenever that qualification is at an end:—also called a base fee ; 3. Fee simple conditional, a term usually understood to refer to that particular species called a conditional fee at common law, which was a fee restrained in its form of donation to some particular heirs, exclusive of others, as to the heirs of a *man's* body. This is as to the form of donation the same kind of estate as an estate tail.

It is to be observed that the above division relates to the *quality* not the *quantity* of the estate.

What is the nature of that estate termed a "base fee?" How was a base fee acquired previous to the 28th August, 1833 ? How since that time can a base fee be acquired by a tenant in tail in remainder ?

A base or qualified fee is one that has a qualification subjoined to it, and which must be determined whenever the qualification is at an end, as in the case of a grant to A. and his heirs, tenants of the Manor of Dale ; in this instance, whenever the heirs of A. cease to be tenants of that manor the grant is entirely defeated.

A base fee has now, however, a more restricted application, *viz.* to that species of qualified fee which is created where the tenant in tail conveys his estate by bargain and sale to another and his heirs, in which case the latter will take an estate in fee simple so long as the tenant in tail has heirs of his body. And in the Fines and Recoveries Act its meaning is by express provision confined (so far as that statute is concerned) to the estate created by the alienation of the tenant in tail where the issue are barred, but those in remainder or reversion are not. Such an estate was, before 28th August, 1833, the date of the Act, created by the tenant in tail levying a fine, and since then by an assurance executed by the tenant in tail without the consent of the protector.

What is an estate tail ?

An estate tail is that which a man hath to hold to him and the heirs of his body, or to him and particular heirs of his body. It was as before-mentioned at first considered in the same light as a fee simple conditional, but by force of the statute mentioned in the next answer it received another character, *viz.*, that of an estate in fee tail, the incidents and consequences of which are very different from those of a fee simple conditional.

By force of what statute is a fee tail ?

The Statute of Westminster the 2nd, commonly called the Statute *De donis conditionalibus*, by which it was enacted that the will of the donor should be

observed *secundum formam in carta doni expressam*, and that tenements given to a man and the heirs of his body, or the like, should, notwithstanding alienation by the donee, go to his issue ; or, if issue failed, revert to the donor. By force of this statute, it was held that the donee had no longer a conditional fee simple, but an estate in fee *cut down* and confined to the *heirs of his body*.

How many kinds of estates tail are there ?

Estates tail are either *special* or *general* ; both of them may be in *tail male*, or *tail female*.

What constitutes an estate in tail general and what special ?

Tail general is where lands are given to one *and the heirs of his body* begotten, and is so called because all the issue of the donee by any marriage is capable of inheriting the estate *per formam doni*.

Tail special is where the gift is restrained to the heirs of the donee's body by a particular person, as where lands are given to a man and the *heirs of his body on Mary, his now wife*, to be begotten.

If lands be given to a man and the heirs male of his body, and he has issue only a daughter, who has issue a son, and dies, and then the donee dies, what is the effect as to the estate given ?

In this case the donee has an estate in tail male general, which can only descend to male issue, and the male descendants of *males*. The grandson of the donee cannot therefore inherit, as he cannot deduce

his descent wholly by heirs male, consequently there is a failure of inheritable issue, and the lands revert to the donor.

By what words in a deed may an estate in tail male, in tail general, and in tail special be aptly created?

An estate in tail male is created in a deed by a limitation to one and the *heirs male of his body*; in tail general, to a man and the *heirs of his body*; in tail special, to a man and the *heirs of his body on Mary, his now wife, to be begotten*.

By a will lands are limited "to A. in tail general." The same limitation by deed. What estate does A. take under the will and the deed respectively?

As in a deed the word "heirs" is necessary to create a fee, so in further imitation of the strictness of the feudal rule, the word *body*, or some other words of procreation, are necessary to make it a fee tail. Under the deed, therefore, A. will take only an estate for life, for want of words of inheritance and procreation.

But in the case of wills a greater indulgence has always been allowed, and an estate tail may be created by any mode of expression sufficient to indicate an *intention* to confer an inheritance, but to restrain it to the descendants of the devisee. Under the will, therefore, A. will take an estate in tail general.

If lands are conveyed to A. and the heir of his body, what estate or interest does A. take? Does he take an estate for life, an estate tail, or an estate in fee simple?

If conveyed by deed, A. will only take an estate for life. If conveyed by will, he will take an estate in fee tail, for the reasons mentioned in the last answer.

Can a tenant in tail make a lease which will bind any and what persons after his decease? State the authority for your answer.

Every tenant in tail in possession may, by 3 & 4 Will. 4, c 74, make leases by deed without the necessity of enrolment for any term not exceeding twenty-one years, to commence from the date of the lease, or from any time not exceeding twelve calendar months from its date, where the rent reserved is a rack-rent, or not less than five-sixth parts of a rack-rent (see ss. 15, 41); and also, by 19 & 20 Vict. c. 120, ss. 32, 33, any person entitled to the possession or receipt of the rents under a settlement made after 1st November, 1856, for an estate for life, or for years determinable with his life, or for any greater estate (which includes an estate tail), may make leases for twenty-one years in such form as in the Act prescribed. See *post*.

What is an estate tail in remainder, and what an estate tail in possession?

An estate tail is in remainder when it is preceded by an estate for life, or any greater estate; and, under the Fines and Recoveries Act, an estate tail limited by any settlement after an estate for years determinable on a life or lives, is in remainder for the purpose of

barring the entail. If not preceded by any such estate, it is said to be in possession.

If a tenant in tail discharge incumbrances on the inheritance, what is the consequence?

If a tenant in tail in possession pays off an incumbrance, it will ordinarily be treated as extinguished, unless he keeps it alive by some assignment, or otherwise shows an intention to hold himself out as a creditor of the estate in lieu of the mortgagee, because a tenant in tail in possession can make himself absolute owner of the estate. But the like doctrine does not apply to a tenant in tail in remainder, whose estate may be altogether defeated; for, if he pays off an incumbrance, it must be presumed that he meant to keep it alive.

What is the difference between an estate in fee simple, and an estate in tail general?

They differ both as to the quality of the estate (as to which see preceding answers), and also as to the mode of their conveyance (as to which see *post*).

Can personal property be entailed?

No: words conferring an estate tail in real, give an absolute interest in personal estate. Thus, when a term of years was given to B. and the heirs male of his body, it was held that B. was absolutely entitled to the term, which on his death went to his executors.

FREEHOLD ESTATES NOT OF INHERITANCE.

What are estates for life, and into what two classes may they be divided?

They are freeholds, not of inheritance: they may be divided into (1) conventional, *i. e.*, those expressly created by the act of the parties; (2) legal, *i. e.*, those created by construction and operation of law.

What, by common speech, is he called who holds for the term of his own life, and what he who holds for the term of another's life?

When he holds for his own life, he is called tenant for life; when he holds for the life of another, he is styled tenant *pur autre vie*.

If a tenant in fee simple makes a lease of lands to B., to have and to hold to B. for term of life, without mentioning for whose life it shall be, what shall it be deemed, and why?

It will be an estate for the life of B.; for an estate for a man's own life is more beneficial, and of a higher nature, than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor.

A. enfeoffs to B. and his assigns for ever. Livery of seisin is duly made; what estate does B. take by the feoffment?

B., by the feoffment, takes an estate for life only,

for as there are no words of inheritance or heirs mentioned in the grant, it cannot be construed to be a fee.

What is special occupancy ?

Where an estate, *pur autre vie*, is granted to a man and his heirs, during the life of *cestui que vie*, and the grantee dies during the life of the *cestui que vie*, his heir is entitled to succeed ; and this right of the heir of the grantee to enter and occupy the land during the residue of the estate granted is called title by special occupancy.

Explain the term "tenant in tail after possibility of issue extinct," and the nature of the estate.

When an estate is granted to one in special tail, and the person from whose body the issue was to spring dies without issue, or having left issue, that issue becomes extinct, the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct ; the estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring ; for no limitation, conveyance, or other human act can make it. It is of an amphibious nature, partaking partly of an estate tail and partly of an estate for life. The tenant has a greater privilege, in respect of quality of his estate, than a tenant for life ; thus, he is punishable for waste ; but he has not a greater quantity, thus, he cannot bar the entail ; he may exchange with a tenant for life, and formerly forfeited his estate on a feoffment.

To what extent may a tenant in tail after possibility of issue extinct commit waste?

As before mentioned, he has the same privileges in this respect as a tenant in tail, and may commit what waste he pleases, subject, however, to equitable waste (as to which, see *post*).

What is tenancy by the curtesy of England?

It is one to which a man is by law entitled for life, on the death of his wife, in the lands and tenements of which, during the marriage, she was seised in fee-simple, or fee tail, provided he had issue by her born alive, during the marriage, and capable of inheriting her estate.

What are the requisites to establish the husband's right as tenant by the curtesy of England?

There are four: (1) marriage, which must be legal, and subsisting at the death; (2) seisin of the wife, which must be an actual one: not a bare right to possess, which is a seisin in law, but an actual possession or seisin in deed; (3) issue born alive, during the life of the wife, and capable of inheriting the mother's estate: by birth of issue the husband becomes tenant by the curtesy initiate, but his estate is not consummate till (4) the death of the wife, which is the last requisite.

Is there any and what exception as to such tenancy with respect to any lands in any particular county in England?

By the custom of gavelkind (prevailing chiefly in

Kent), the husband has no more than a moiety of his wife's lands as tenant by the curtesy, and only while he continues unmarried, but his title attaches whether he has issue born alive or not.

To entitle a husband to curtesy, is it necessary that the issue should be next heir of the wife?

The issue born must be capable of inheriting the wife's estate; thus, if a woman be seised in tail male, and hath a daughter only, the husband is not entitled to curtesy.

What is dower?

It is an estate for life, to which a woman is entitled on the death of her husband, in a third part of the lands and tenements of which her husband died possessed in fee-simple or fee-tail, and to which any issue which she might have had might by possibility have been heir.

What is the difference between common law dower and dower as regulated by 3 & 4 Will. 4, c. 105.

At common law, dower was the life estate of a widow in the third part of the lands of her deceased husband, of which he was solely seised for an estate of inheritance at any time during the coverture. This right having once attached could not be defeated by any conveyance or devise by the husband, and was paramount to his debts. It could only be released by means of a fine. The husband's estate must have been a legal estate of inheritance in possession (though a reisin in law was sufficient), and held in severalty or

in common, and not in joint tenancy. As to women, married since the Dower Act, 1st January, 1834, no widow is entitled to dower out of lands which have been absolutely disposed of by the husband in his lifetime or by his will; and all partial estates, and all charges created by the husband by deed or will, and all debts and incumbrances of the husband are effectual as against the widow's dower. The husband may also bar her right, either wholly or partially, by any declaration for that purpose made by him, by any deed or by his will. Dower under the statute is extended to all lands to which the husband had a right merely, without being seised, and to equitable as well as legal estates of inheritance.

Is the widow of a tenant in tail who died without issue entitled to dower? Would the widow's right, if any, be affected, and how, if her deceased husband had been tenant in tail after possibility of issue extinct?

It is not necessary that issue should be actually born; it is sufficient if the wife might have had issue who might have inherited. The widow, therefore, of a tenant in tail, who died without issue, is entitled to dower. If a tenant in tail after possibility of issue extinct marries a second wife, that second wife will not be endowed of the lands given to her deceased husband in special tail; for no issue that she could have could by any possibility inherit them.

What is the difference between jointure and dower?

and how is the former constituted, and how does the latter arise?

Jointure is an estate limited to the wife for life, to take effect in possession or profit after the death of her husband. It is constituted by an express deed, made on the marriage of the parties, and is in lieu of dower. Dower arises by operation of law.

When must jointure be effectual to bar dower? Can a widow be entitled to both, and if so, in what case?

To make the jointure an effectual bar to dower: (1) it must be made to take effect immediately on the death of the husband; (2) it must be for her own life at least, and not *pur autre vie*, or for a term of years, or other smaller estate; (3) it must be made to herself, and no other in trust for her; (4) it must be made in satisfaction of her whole dower, and not of any particular part of it; (5) it must be made before marriage, as, if made after, she has her election either to accept it or refuse it and take her dower, for she was not capable of consenting to it during the coverture. In no case can she claim both jointure and dower.

What is the effect of a jointure upon dower, when the instrument creating the jointure does not contain the common stipulation that the jointure is to be in lieu of dower?

It will have the effect of barring the widow's right to dower, provided it sufficiently appear by the deed to be in satisfaction of her whole dower.

How may dower and curtesy respectively be barred?

Dower may be barred: (1) by elopement or divorce; (2) by detaining the title deeds from the heir; (3) by jointure; (4) if married before 1st January, 1834, the widow's right to dower may also be barred by deed, acknowledged under the Fines and Recoveries Act, or by the conveyance to the husband being made to uses to bar dower. If married after that date, by any alienation by the husband, or any declaration contained in his purchase deed, or any deed executed by him or in his will. Curtesy does not attach if any of the requisites before mentioned are wanting.

Is a tenant for life without impeachment of waste liable for any, and what, damage to the estate? May he cut and sell timber, and apply the proceeds for his own benefit, or must the proceeds be applied for the benefit of the estate?

A tenant for life is answerable by law for waste, *i.e.*, any spoil and destruction which he does, or allows to be done, to the premises, to the injury of the person entitled to the inheritance. Where, however, the estate is given without impeachment of waste, he is free from such restraint, subject, however, to such acts of waste as the Court of Chancery would formerly have restrained as being of manifest injury to the inheritance, *e.g.*, the felling of ornamental timber, which is called equitable waste. For it is enacted by the S. C. J. Act, 1873, that an estate for life without impeachment of waste shall not confer upon the tenant any

legal right to commit waste of the description known as equitable waste, unless an intention to that effect expressly appear (s. 25); subject to this, therefore, he may cut and sell timber, and apply the proceeds for his own benefit.

Tenant for life sows land in his own occupation and dies before the crop can be severed, who is entitled to such crop, and what is such crop called? And, suppose the tenant for life had leased the land, not under any express leasing power, and the lessee had sown it, what would be the consequence to the lessee? and state any change in the law on this point.

If a tenant for his own life sows the lands, and dies before harvest, his executors shall have the emblements or profits of the crop. And if the tenant for life underlet, his underlessee shall have the same privilege. As regards tenant at rack-rent holding under a landlord entitled for life or other uncertain interest, a more ample protection is provided, it being enacted by 14 & 15 Vict. c. 25, that in such cases the tenant shall, instead of claiming emblements, continue to hold upon the same terms until the expiration of the then current year of his tenancy, at which time he shall quit without notice, and the succeeding owner shall be entitled to a fair proportion of the rent.

D. is a rector, and has sown part of the glebe lands with wheat, and dies before harvest time, to whom will this crop belong, and what is such crop denominated?

To his executors; the advantages of emblements

being expressly extended to the parochial clergy by the stat. 28 Hen. 8, c. 11, s. 6.

State the maxim, as quoted by Blackstone, applicable to the executors of a tenant for life claiming emblements.

The maxim, is "*Actus Dei neminem facit injuriam.*"

Can a tenant for life in possession make a lease to continue beyond his life, and if so, under what circumstances so as to be good against those in remainder?

As a general rule a tenant for life cannot make any disposition of the lands to take effect after his decease. But he can grant leases binding on those in remainder: (1) where a special power to grant leases is given him by the settlement; (2) under the 32nd section of Leases and Sales of Settled Estates Act, which enacts that a tenant for life, or for years determinable on his life, under a settlement made after 1st November, 1856, and which contains no provision to the contrary, and also a tenant by the curtesy, or in dower, or in right of his wife who is seised in fee, may demise the lands or any part (except the mansion-house and demesnes, and lands usually occupied therewith) for any term not exceeding twenty-one years, to take effect in possession, the demise must be by deed, the best rent reserved, without any fine, it must be impeachable for waste, and contain a covenant for payment of rent, and the usual covenants, and a condition for re-entry on non-payment of rent for twenty-eight days, or non-observance of the covenants; (3) under the 2nd section

of the same Act and the Act of 1858, with the sanction of the Court. (As to this, see next answer.)

In regard to the Acts of 1856 and 1858, authorising, under sanction of the Court of Chancery, leases and sales of settled estates, state the extent of the leases authorised for agricultural, mining, repairing, and building purposes respectively, the authority for special provisions for building land, and reservation of minerals?

The extent of the leases authorised by these Acts is for agricultural, twenty-one years; mining, forty years; repairing, sixty years; building, ninety-nine years; and if the Court be satisfied that it is the custom of the district and beneficial to the inheritance to grant longer leases, it may authorise the grant of a longer term, except in the case of agricultural leases. When land is sold for building purposes the Court may allow the consideration, either wholly or partially, to be a rent issuing out of the land to be secured as approved by the Court, and on any sale the minerals may be excepted and any rights reserved, and the purchaser may be required to enter into such covenants or restrictions as the Court deems advisable. The Court here referred to was the Court of Chancery; and therefore, after 2nd November, 1874, applications must be made under this Act to the First Division of the Supreme Court.

What is the effect of a lease made under the Act 19 & 20 Vict. c. 120, s. 32, as to the interest of parties

entitled to any charge or incumbrance affecting the estate out of which the lease takes effect?

The rights of such parties will not be affected by any such lease unless they concur (s. 41).

If the dividends on a sum of consols are given to A. for life, and he dies on Michaelmas-day, are his executors entitled to any portion of the next January dividend, and does it make any difference under what document he takes if it be silent as to apportionment?

A's executors are entitled to a proportion of the dividends up to Michaelmas-day, for by the Apportionment Act, 1870, all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise), shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly (s. 2). This Act applies whatever the date of the instrument. (Lynch's Statute Law, 1870.)

The old Apportionment Act, 4 & 5 Will. 4, c. 22, applied only to instruments executed since 16th June, 1834.

Tenant for life grants leases under a power, and dies in the middle of a half-year, are the rents apportionable at his death?

Yes; as all rents are to be considered as accruing from day to day, and apportionable in respect of time according.

Can a tenant for life, by any and what means,

create a permanent charge on the estate for improvement upon it?

A tenant for life desirous of making permanent improvements, and charging the costs thereof on his estates, should apply to the Inclosure Commissioners for England and Wales for their sanction, under the Improvement of Land Act, 1864. If the Commissioners, after issuing certain advertisements, and other preliminary proceedings, find that the proposed improvements would increase the yearly value of the land beyond the amount proposed to be charged, they may, by what is called a *provisional* order, sanction the same, and fix the rate of interest to be allowed on the costs thereof; the works are then proceeded with, and as soon as the Commissioners are satisfied that the improvements are made, they are to execute a charge under their seal on the inheritance for the costs and interest, and the expenses of the application, &c.; this is called an *absolute* order, and every charge thereby created is to be by way of rent-charge, payable half-yearly, extending over the term fixed by the provisional order. Improvement of land within the meaning of this Act is to include works of drainage, irrigation, and embankment against the sea or tidal waters, making farm roads and canals, and erection of farm buildings, engine-houses, &c. And by the Limited Owners Residences Act, 1870, it is extended to the erection and improvement of mansion-houses and necessary buildings appurtenant thereto.

Is a tenant for life bound to pay off incumbrances, or to keep down the interest? and if a tenant for life discharge incumbrances, what is the consequence?

With respect to the compulsory discharge of incumbrances, the rule is that a tenant for life shall contribute beyond the interest in proportion to the benefit he derives from the liquidation of the debts, and the consequent cessation of interest, which, of course, will much depend on his age and the computation of the value of his life. As to keeping down interest, a tenant for life must keep down interest which has accrued during his own time so far as the rents and profits will extend. If a tenant for life voluntarily pay off an incumbrance, it must be presumed that he means to keep it alive for his own benefit.

What is the estate or interest of a "parson" in the church lands, and by what tenure does he hold them? Distinguish between a rector and a vicar.

The estate of a parson in the church lands is an estate for life only, with the fee-simple in abeyance; it is of freehold tenure. The rector of a church, properly called a "parson," is one that hath full possession of all the rights of a parochial church. In a non-appropriated living the rector must be a spiritual person, and has the cure of souls in the parish, with an exclusive title to all the emoluments. In an impropriated or appropriated living, the rector may be a lay or spiritual person; if the former, he is styled an impropriator, and if the latter an appropriator, and as such

never has the cure of souls; but, in general, there is a spiritual person attached to the church under the name of vicar, to whom the cure of souls belongs, and to whom a portion of the emoluments, by way of exception out of those enjoyed by the rector, is assigned.

Who is entitled to the glebe and great and small tithes, and what duties or obligations attach to the ownership of any of these properties?

The freehold of the glebe, tithes, and other dues, rests during his life in the parson. Where the living is appropriated, the rector usually takes the great tithes and the vicar the small tithes. As to the duties attending this ownership, they are principally of ecclesiastical cognizance, those only excepted which arise by statute, the principal of which is the duty of residence. Where there is an official house of residence attached to the benefice the incumbent is under the obligation of keeping it in repair. As to the obligations of a rector with reference to the chancel, see next answer.

What are the obligations and rights of a lay rector with reference to the chancel of the parish church?

He is under the obligation of repairing it. He has the freehold therein, while the body of the church and churchyard are the vicar's freehold. Yet with the exception of the chief pew in the chancel, which belongs to the impropiator, the disposal of the seats in the church appertains to the ordinary, and practically to the churchwardens, to whom the authority of the

ordinary is delegated. Moreover, no monument can be set up without the ordinary's consent.

Is there any mode by which a clergyman can mortgage his benefice, or charge it by warrant of attorney or otherwise?

By the stat. 13 Eliz. c. 20, ecclesiastical persons with the cure of souls are restrained from charging their benefices in any way so as to render them liable to the payment of any pension or profit thereout. Not only a direct charge, but also an agreement to charge is void under this statute. In several late Acts provisions are contained enabling a beneficed clergyman to raise money according to the value of his benefice by mortgage of its profits, for the purpose of repairing or rebuilding his house of residence, or to provide a new one, and the 1 & 2 Vict. c. 106, gives a form of such mortgage. But subject to this he can in no way charge his benefice.

ESTATES LESS THAN FREEHOLD.

What is a chattel real?

A chattel real is any estate in lands or tenements which does not amount to a freehold. Such an estate is considered in law as a mere chattel, and is personal estate, but inasmuch as it concerns or savours of the realty it is denominated a chattel real in order to distinguish it from mere movables, which are denominated chattels personal.

What are estates less than freehold ?

They are the following: estates for years, estates at will, estates at sufferance.

What change has lately been made in the law with reference to an assignment by the owner of a chattel real to himself, jointly with others or another, and how and when was such change made ?

By the 22 & 23 Vict. c. 35, it is enacted that any person shall have power to assign personal property, including chattels real, directly to himself and another person or corporation, by the like means as he might assign the same to another (sec. 21). This Act was passed in August, 1859 ; before this it was necessary for the owner to assign the property to a third person, who would re-assign to the owner and the others jointly.

What are estates for years, and what denomination of property are they ?

An estate for years is where a man has an interest in lands and tenements and a possession thereof by virtue of such interest for some fixed and determinable period of time. It amounts but to a chattel real, however long the term may be, and is denominated personal estate.

Which is the more valuable in quality, an estate for life, which may terminate to-morrow, or for an absolute term of 1000 years ? Is the owner of both estates entitled to exercise full proprietary rights, or in what respect is he limited in each case ?

The estate for life ; for in contemplation of law no

interest for a certain and determinate period of time, even for 1000 years, which is merely a chattel, is as large as an estate for life, which is freehold. Neither tenant is entitled to full proprietary rights. A tenant for life is, as we have seen, liable for waste, whether voluntary as by the tenant's voluntary act, or permissive as by his default. But he is entitled to reasonable estovers or botes, *i.e.* an allowance of wood for fuel, repairs, and the like. He may dispose of his life estate by deed, and in the case of a tenant *pur autre vie*, by will; but he can grant no leases to endure beyond his own life, except under a power or where he is specially authorized by Act of Parliament. He is entitled to emblements where his life estate does not determine by his own act.

So a tenant for years is liable generally in the same way for waste, and is entitled to the same estovers or botes. He may assign his term or bequeath it by will, but he can grant no leases to endure beyond his own term. In certain cases he is entitled to emblements. Where the term depends upon an uncertainty, as if it be determinable on a life or lives, he is entitled to emblements. But if it depends upon a certainty he is not, in the absence of any special contract or custom to the contrary, as it was his own folly to sow where he could not reap.

Can a lessee for 999 years grant a lease for life? and give the reason for your answer.

He cannot; for the estate for 999 years is merely a

chattel real, and therefore a smaller estate than an estate for life, which is freehold.

What is the difference in the tenure of the following estates: a lease to A. for 99 years; a lease to A. for 99 years if B. shall so long live; a lease to A. for three lives; a lease to A. for 99 years if he shall so long live?

A lease to A. for 99 years, and a lease to A. for 99 years, if he shall so long live, or if B. shall so long live, are leasehold merely, the duration of the term being fixed and determined. But a lease to A. for three lives gives him a freehold interest.

What would be the effect of a devise or gift of leaseholds for years by words which would create an estate tail if the estate were a freehold?

The devisee will take the leaseholds absolutely. Thus, in the leading case of *Leventhorpe v. Ashbie*, A. devised a term of years to B. and the heirs male of his body begotten; and it was held that B. was absolutely entitled to the term, and that on his death it went to his executors. (L. C. Conv. 763.)

For what length of time is a tenancy by parol binding, without a written agreement?

A lease for not more than three years upon which the rent reserved amounts to two-thirds of the improved value of the land. If for a longer term, or at a lower rent, it must be by deed.

What leases can infants make, and what tenancy has the lessee?

An infant cannot make a lease of his lands unless it be evidently for his benefit. If not for his benefit, although not actually void, it is voidable by him when he comes of age, or by his heirs if he dies under age. When he comes of age, however, he can confirm it.

What tenancy has a lessee from an idiot or lunatic? and, to have a secure tenancy for the term, what course should be adopted? And by what means can idiots or lunatics renew leases?

Leases by idiots and lunatics are void. But the Lord Chancellor may authorise the committee of the estate of a lunatic to make leases subject to such rents and covenants as he may direct, and also to accept a surrender of an old lease and grant a new one.

What estate must a person have to enable him to make a lease by which the lessee may derive a present tenancy and occupation?

An estate in possession.

If a remainderman, not in possession, makes a lease, what estate or interest would the lessee derive under it?

Both lessor and lessee are estopped from denying the validity of the lease, and on the estate of the former falling into possession the lease will take effect, and become a regular estate for a term of years.

Explain the provisions of the Acts of 1849, 1850, for remedying defects in leases under powers. What provision is made for giving validity to leases invalid by reason of deviation from the terms of the power?

and what provisions for the confirmation of such leases?

The Act of 1849 (12 & 13 Vict. c. 26) provides, that where in the intended exercise of a power a lease is granted, which by reason of any deviation from the terms of the power is invalid against those in remainder or reversion, such lease, in case the same was made *bond fide*, and the lessee has entered thereunder, is to be considered in equity as a contract for a valid lease under the power, save so far as any variation may be necessary in order to comply with the terms of the power. But if the remainderman or reversioner is able and willing to confirm the invalid lease without variation, the lessee is bound to accept such confirmation.

By the Act of 1850 the mere acceptance of rent by the reversioner is not to be deemed a confirmation, as was provided by the Act of 1849, unless upon or before such acceptance some receipt or memorandum or note in writing confirming such lease is signed by the person accepting such rent or his agent.

What is a tenancy for a term of years? and what is the lessee when he enters by force of the lease?

An estate for years has been defined.

When the lessee enters under the lease, the estate is then completely vested in him, and he is tenant to the lessor. Until entry he has no estate, only an *interesse termini*.

What is an interesse termini, and is it assignable?

An *interesse termini*, or interest in the term, is the interest or right of entry acquired by a lessee under a lease before the term becomes completely vested in him by entry. It is considered in law as no estate, but it is so far in the nature of one that it is assignable.

Describe the title given by a lease for a term of years, to commence at next Christmas.

This is an instance of an *interesse termini*.

What, if any, difference is there, supposing the term to have been created by way of use, by a tenant in fee?

Where the lease is made by any conveyance operating by virtue of the Statute of Uses, the lessee has the whole term vested in him at once, the entry required by law being supplied by the Statute.

What estate passes by signing and sealing an agreement for a lease?

By an agreement for a lease no legal interest in the term or in the lands demised is vested in the intending lessee; he is merely entitled to bring an action for damages or specific performance.

How can a tenancy from year to year be created, and how determined?

It may be created (1) by the express agreement of the parties; and this (provided the rent reserved be two-thirds at least of the value of the lands demised) may be either verbal or in writing, but if under that amount, it must be by deed; and (2) by construction

of law, as in the case of a general letting at a yearly rent. And see other examples, *infra*.

It is determined by half-year's notice, which must always be for quitting at the end of some particular year of the tenancy.

(1) *A. lets premises to B, reserving a compensation not referable to a year or the aliquot part of a year ;*
(2) *A. lets premises to B. at so much a year, payable quarterly. Nothing is said in either case as to terms. What tenancies are respectively created ?*

(1.) In this case a tenancy at will merely is created.

(2.) A tenancy from year to year ; for where there is a general letting at a yearly rent payable quarterly, and nothing is said about the duration of the term, it is an implied letting from year to year. (*Richardson v. Langridge*, L. C. Conv. 4.)

A., in writing, agrees to let land to B. for a term of years at a certain rent ; B. enters into possession and pays the rent to A. ; what is B.'s tenancy, and what right has he against A. ?

If the rent paid by B. be referable to a year, or any aliquot part of a year, he becomes tenant from year to year (see last answer). He is, therefore, entitled to hold the lands for one year certain, as his tenancy can only be determined by half-year's notice, to expire at the end of the current year of his tenancy ; and he can by action enforce performance of the agreement against A.

A., tenant for life of an estate, let to B., from year to

year, at a rent payable half-yearly at Lady Day and Michaelmas, died at Christmas. C., the reversioner, receives the half-year's rent due at the next Lady Day. Will this create any, and what, tenancy between C. and B., and when will the same determine?

In such a case, acceptance of rent, as rent, by the remainderman will be evidence of a new tenancy from year to year, so as to render a notice to quit necessary in order to determine it.

If a person seised in fee makes a lease, reserving rent payable half-yearly, and dies in the middle of a half-year, who is entitled to the half-year's rent when due?

It will be apportioned between the heir or devisee and the executors or administrators of the deceased; for, by the Apportionment Act, 1870, all rents and other periodical payments in the nature of income (whether payable under an instrument in writing or not) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly. The old Apportionment Act (4 & 5 Will. 4, c. 22) did not apply in such a case as above mentioned.

What is waste by a lessee of a house and of a meadow; what is the effect on the lessee's title if he commit waste? and what is the effect of the reservation in the lease of a meadow of an additional rent of £20 per acre if the grass is broken up and converted into tillage?

Waste of a house and meadow may be either volun-

tary, as where the tenant pulls down the house, or converts the meadow into arable land; or permissive, as by suffering the house to fall for want of repair, or by suffering the sea or a river to overflow the meadow and thereby render it useless. The tenant is liable to an action for damages if he commit waste, and can be restrained by injunction. And, in addition, there is usually a clause in the lease giving the lessor a power to enter and avoid the lease on waste being committed.

Additional rent reserved as above can be recovered either by distress or action.

If, in a lease, the lessee covenant to keep the premises in repair, except damage by fire, or some particular repairs, can he compel the lessor to do the excepted repairs without an express covenant on his part for the purpose?

No; the lessor is not bound to do the repairs, without an express covenant for that purpose.

Is a lessee under the usual covenants to repair, and to pay rent, liable to pay rent whilst the buildings are uninhabitable, by reason of fire, until they are rebuilt? and is there any, and what, exception or relief to such liability?

It is no defence to an action for the rent that the demised premises had been burnt down, and have not been rebuilt; and the tenant can obtain no equitable relief in such a case.

Is a lease forfeited if the covenant to insure be

broken one year, though the insurance be effected in subsequent years?

The Court will, under the 22 & 23 Vict. c. 35, grant relief, upon such terms as it thinks fit, against a forfeiture for breach of such a covenant, where no loss or damage by fire has happened, and the breach was committed through accident or mistake, or otherwise, without fraud or gross negligence, and there is an insurance on foot at the time of the application. A record of such relief is endorsed on the lease; and the Court will not relieve more than once, nor where a breach of the same covenant has been waived out of Court.

A., holding Blackacre and Whiteacre of B., under a lease, containing a power of re-entry on assigning without license, assigns Blackacre with license, and afterwards assigns Whiteacre without license. Does the last-mentioned assignment operate as a forfeiture of Whiteacre? and what would have been the result twenty years ago?

Yes; for by 22 & 23 Vict. c. 35, a license for the breach of a covenant with respect to part only of the property shall not destroy the right of re-entry as to the remainder of the property. Before 1859 it was held that a condition of re-entry was entire and indivisible; and, having been waived as to one part of the property, it could not be enforced as to the other.

What is the distinction between "privity of con-

tract" and "privity of estate," as between lessor and lessee?

Between lessor and lessee both privity of contract and privity of estate exist. Privity of contract is that relationship which exists between two or more contracting parties; it is a personal privity, and extends only to the persons of the lessor and lessee. Privity of estate is that participation of interest by parties in respect of some estate passing from one to the other; thus, it not only exists between lessor and lessee, but if the lessee assign, a privity of estate will arise between the lessor and assignee by virtue of which the covenants in the lease become mutually binding.

Is the assignee of a lease to any, and what, extent liable to the original lessor under the covenants of the lessee?

The assignee, as such, is liable to the landlord for the rent unpaid, and for the covenants running with the land broken during the time the term remains vested in him, though he may never enter into actual possession. On assignment by him, his liability for further breaches ceases.

How does such liability of the assignee of the lessee differ from the liability of the lessee's executors?

An assignee is only liable on such covenants running with the land as are broken while he continues tenant. An executor of the lessee is liable to the extent of the assets on all the lessee's covenants during the term, except when he becomes exonerated under

22 & 23 Vict. c. 35, mentioned *infra*. He is personally liable only when he has had an actual and beneficial occupation of the demised premises.

What difference is there between the liability of the lessee and the liability of the lessee's assignee in regard to breaches of covenant?

The lessee is liable on his express covenants during the whole continuance of the term, notwithstanding any assignment which he may make ; but the assignee is only liable for such covenants as run with the land, which may be broken during the time that the term may be vested in him, and not after he has assigned it over to another person.

A. takes a beneficial lease, and afterwards assigns it to a purchaser. Do he and his executors remain liable to the rents and covenants? and if they do, how may they be most effectively protected against them?

A. and his executors remain liable for the rent and covenants during the whole continuance of the term, notwithstanding any assignment by the lessee. An executor, however, on assigning his testator's term, is exonerated from all future liability if he have satisfied all claims then subsisting, and set apart a sufficient sum to answer any future claim that may be made in respect of any fixed sum covenanted to be laid out by the lessee, though the time for laying it out has not arrived. (22 & 23 Vict. c. 35.)

On assigning leasehold premises, the assignee must enter into a covenant with the assignor to indemnify

him against the payment of the rent and performance of the covenants contained in the lease.

What is an improved leasehold ground rent? and how is it usually created?

An improved leasehold ground rent is where a lessee grants an underlease of the land (usually for building purposes) at an improved or higher rent than what he himself pays.

Is a sub-lessee to any, and what, extent liable to the original lessor under the covenants of the lessee in the original lease?

A sub-lessee is not liable to the original lessor under the covenants of the lessee in the original lease. He is tenant to the lessee, and not to the original lessor; between the latter and the under-lessee no privity exists.

Can a tenancy from year to year, created by parol, be surrendered by parol?

No; for, by the Statute of Frauds, it is enacted that no lease or term of years shall be surrendered unless by deed or note in writing, signed by the party surrendering or his agent; and, since the 8 & 9 Vict. c. 106, it must be by deed.

Does the surrender of an original lease affect an under-lease? and give a reason for your answer.

On the surrender of a lease the term thereby granted becomes merged in the freehold, and formerly, as a consequence of this merger of the term, all its incidents, of which the rent due from the under-tenant

was one, perished also. This was provided for by the Statute of George 2, in the case of leases surrendered in order to be renewed. But this Act is now repealed by the 8 & 9 Vict. c. 106, which provided that where the reversion expectant on a lease is surrendered or merges, the estate which confers, as against the tenant under the same lease, the next vested right to the premises shall, for the purpose of preserving the incidents of such reversion, be deemed the reversion expectant on the same lease.

A. grants a lease to B. of certain hereditaments for lives; B. grants under-leases of those hereditaments, and afterwards is desirous to have a further or renewed lease of the premises from A. How is that to be effected?

B. can surrender his lease to A., and obtain a renewed lease for the term desired. And, notwithstanding such surrender, he will have the same right to the rent from his under-tenants, and the same remedy for the recovery thereof, as he would have had if the original lease had been kept on foot. (See last answer.)

Explain the nature and effect of attornment.

Formerly no grant could be made of any reversion or seignory without the consent of the tenant expressed by what was called attorning, or professing to become the tenant of the new lord. By 4 & 5 Anne, c. 16, attornments are no longer necessary to complete any grant or conveyance; and by 11 Geo. 2, c. 19, the frau-

dulent attornment of a tenant to a stranger claiming title, to the prejudice of the landlord's possession, is wholly inoperative. A legal attornment may, however, still be required, as where the new landlord claims as tenant by *elegit* or otherwise under a judgment.

If A., seised of land in fee, demised it to B. for life, rendering for the same to A., and his heirs and assigns, an annual rent (without further powers or covenants in the demise); what remedies would A. and his heirs have for recovery of the rent?

A remedy by action or distress.

Where a lessor brings an action of ejectment for non-payment of rent reserved by the lease, for want of sufficient distress on the premises, and obtains judgment and possession under an execution, can the lessee obtain relief?

The tenant may obtain relief if he applies to the Court within six calendar months next after the execution of the judgment on the ejectment, and on payment of all arrears of rent and full costs.

Where a tenancy is for a term of years certain, is any, and what, notice to quit necessary?

No notice to quit is necessary, but the lessor may, immediately upon the expiration of the term, commence an action of ejectment.

What is an attendant term, and what was the advantage proposed by the assignment of it?

When a long term of years had been created for a

purpose which was satisfied, it was usual on the purchase of the inheritance for the purchaser to have the term assigned to a trustee of his own nomination "in trust to attend and protect the inheritance." The term was then said to be attendant, and the advantage of such assignment was, that (though a mere chattel) the term followed all the limitations of the inheritance, and at the same time afforded to the purchaser protection against all incumbrances made since the creation of the term, and before his purchase, of which he had no notice.

Did the term ever, and when, become attendant upon the inheritance without an actual assignment to attend?

If the term were neither surrendered nor assigned to a trustee to attend the inheritance, it was still considered attendant on the inheritance by construction of law, for the benefit of all persons interested in the inheritance according to their respective titles and estates.

If an outstanding term had never been assigned to attend the inheritance, at whose expense was such assignment made?

At the expense of the purchaser.

Was there any, and what, advantage to a purchaser, in taking an actual assignment of outstanding terms to trustees, for the purchaser in trust to attend the inheritance over a general declaration that all persons in whom outstanding terms were vested should stand possessed of the same in trust for the purchaser?

There was; for such a declaration would be no protection against a subsequent purchaser for value, without notice who obtained an assignment of the term.

What is the present law as to satisfied terms, and what do you consider the proper practice as to assigning them or not, and why?

By 8 & 9 Vict. c. 112, every satisfied term becoming attendant on the inheritance after the 31st December, 1845, shall immediately thereupon absolutely cease and determine. Also, those attendant before the Act are to cease on that day, but if so attendant by express declaration are to afford the same protection as if they were still subsisting, but had not been assigned or dealt with after that day. The practice, therefore, of assigning such terms is now put an end to.

A., seised in fee, demises to B. for a term in mortgage; A. then mortgages the equity of redemption to C. in fee; A. next pays off B.'s mortgage, and desires to merge B.'s term. How is this to be effected?

An acknowledgment of the receipt of the money endorsed on the mortgage deed will be sufficient without a surrender; for, by virtue of 8 & 9 Vict. c. 112, the term will thereupon cease and determine.

When terms of years are created by settlement? what are the events usually expressed in the proviso for cesser of such terms?

By inserting in the settlement a proviso that the term shall cease, not only at its expiration by lapse of

time, but also in the event of the purposes for which it is created being fully performed and satisfied, or becoming unnecessary or incapable of taking effect.

What is a tenancy at will?

A tenancy at will is, where lands and tenements are let by one man to another, to have and to hold at the will of the lessor, and the tenant, by force of this lease, obtains possession. The tenant has no certain indefeasible estate, as it is at the will of both parties, and may be determined by either at his own pleasure.

When is a tenant at will, on the determination of his tenancy, entitled to emblements? and has the tenant any time allowed him to take them, and what?

If the tenant at will sows the land, and, before it is ripe, the landlord put him out, he is entitled to emblements, and the tenant is to have free ingress, egress, and regress for a reasonable time to cut and carry them away. But it is otherwise if the tenant determines the tenancy, for in this case the landlord shall have the profits of the land.

Is there any, and if any what, distinction between a tenancy at will and a tenancy from year to year?

A tenant at will has no certain indefeasible estate—nothing that can be assigned by him to another—as the lessor may determine his will and put him out whenever he pleases. But a tenant from year to year, as before-mentioned, has an estate for one year certain at least; he can assign his interest to another,

and the tenancy can only be determined by notice as above pointed out.

What is a tenancy at sufferance?

A tenancy at sufferance is where one comes into possession under a lawful demise, and, after such demise is ended, wrongfully continues the possession.

If a tenancy continue after the expiration of a lease, without any new agreement, on what terms does the tenant hold?

If a tenant, after his term is expired, continues to hold the premises without any fresh lease from his landlord, he is merely tenant at sufferance. But if the tenant continue to pay, and the landlord to accept rent, a tenancy from year to year will be created by implication.

What are the remedies of landlords for the recovery of possession from tenants at sufferance?

The landlord, after demand in writing, can bring an action of ejectment in the Supreme Court to recover possession; or, if the value of the premises or the rent does not exceed £50 per annum, he may proceed by plaint in the County Court; or, if the term did not exceed seven years, and the rent did not exceed £20 per annum, he can recover possession by summary proceedings before two justices of the peace.

What are the words of limitation properly used in a deed in creating each respective class of estate?

(1.) An estate in fee simple is created by limiting the estate to "A., his heirs, and assigns for ever."

(2.) An estate in fee tail by limiting it to "A. and the heirs of his body."

(3.) An estate for life is created either by an express limitation to the grantee "for the term of his natural life," or the life of another, or by a general grant, without defining or limiting any specific estate.

(4.) An estate for years is created by a grant to "A., his executors, administrators, and assigns to hold for the term of years," though it is sufficient if it be granted to himself only, without mention of his personal representatives.

No words of limitation are used to create an estate at will, or at sufferance, and a deed is not necessary, the former being created by written or verbal agreement without further ceremony, followed by entry, the latter arising where a tenant holds over after the determination of his tenancy.

How may an estate tail, an estate for life, and an estate for years be destroyed?

An estate tail may be destroyed by barring the entail, and turning it into a fee simple or a base fee; an estate for life or years may be destroyed by surrender or merger. Forfeiture for treason or felony is now abolished. 33 & 34 Vict. c. 23. (See Lynch's Statute Law, 1870.)

ESTATES UPON CONDITION AND HEREIN OF ESTATES HELD IN MORTGAGE AND BY ELEGIT.

What are estates upon condition? and give instances.

They may be either upon condition *implied* or *expressed*.

1. As to estates upon condition implied :

If a grant be made to a man of an "office" generally, without adding other words, the law annexes a condition that he shall duly execute his office, and on breach thereof the grantor can enter and oust him.

2. Estates upon condition *expressed* may be either *precedent* or *subsequent*.

Thus, if A. grants to his lessee for years that upon payment of a hundred marks within the term he shall have the fee, this is a condition *precedent*, and the fee does not pass until the hundred marks are paid. But if A. grants the fee, reserving to himself and his heirs a rent, and that, if not paid, it shall be lawful for him and his heirs to re-enter and avoid the estate, then the grantee has an estate upon a condition *subsequent*.

Where a condition is annexed to the grant of an estate in fee-simple, what is the result of the breach of the condition : 1st, when it is precedent ; 2nd, when it is subsequent ?

In the first case, when the condition is precedent, it must be performed before the estate can vest, and if the condition be void by reason of its being or becoming impossible, or being contrary to law, or repugnant to the nature of the estate, the estate which depends thereon is void also.

In the second case, where it is subsequent, the estate vests in the grantee, but upon failure or non-

performance of the condition the estate is defeated. If the condition, for any of the reasons above-mentioned be void, the estate becomes absolute in the grantee. In the case of a condition subsequent, entry by the grantor or his heirs is necessary in order to avoid the estate.

Is it necessary that a condition to be operative in a deed should be in the deed itself?

A condition to defeat a freehold estate must be in the same deed, or in one executed contemporaneously therewith; in other cases it is not necessary that the condition be in the same deed.

What is a mortgage?

A mortgage is the creation of an estate or interest in property defeasible upon performing the condition of paying a sum of money with interest thereon at a certain time.

What is the difference between the vivum vadium, or living pledge, and the mortuum vadium, or dead pledge, or mortgage?

A *vivum vadium*, or living pledge, is when a man borrows a sum of money (suppose £200) of another and grants him an estate as of £20 per annum to hold till the rents and profits shall repay the sum so borrowed. In this case the land is said to be living; it subsists and survives the debt, and immediately on the discharge of that results back to the borrower.

The *mortuum vadium*, or dead pledge, or mortgage, is where a man borrows of another a specific sum, and grants him an estate on condition that, if he, the

mortgagor, shall repay the mortgagee the said sum with interest, the mortgagee shall reconvey the estate to the mortgagor. In this case the land so put in pledge is by law, in case of non-payment at the time limited, for ever dead and gone from the mortgagor, and the mortgagee's estate is no longer conditional, but absolute.

What amount of interest can be reserved on a mortgage? and can a mortgagee stipulate that, if the interest be not paid at the proper time, it shall be converted into principal?

£5 per cent. was formerly the highest rate of interest allowed on mortgages of lands, but now, since the repeal of the Usury Laws by the statute 17 & 18 Vict. c. 90, any rate of interest may be taken which the mortgagor is willing to pay.

The mortgagee cannot in the first instance stipulate that if the interest be not paid at the time it shall be converted into principal. The interest must first become due, and then there must be an agreement in writing signed to make it principal.

What are the rights and remedies of a mortgagee?

(1.) As to the rights:

After default has been made in payment of the debt at the time appointed the mortgagee's estate becomes absolute at law. He is entitled to enter into possession and take the profits, and may without notice evict the mortgagor, and any tenant claiming under a lease granted *after* the mortgage without his

(the mortgagee's) privity. (*Keech v. Hall*, 1 Sm. L. C. 523.) In case there is a tenant in possession who claims under a lease granted *before* the mortgage, the mortgagor is entitled to the receipt of the rents on giving notice to such tenant, and may distrain. (*Moss v. Gallimore*, 1 Sm. L. C. 561.)

He may grant leases subject to the equity of redemption, and may add to his debt all sums expended in repairing the premises, in renewing renewable leases, or in maintaining the title to the estate. He cannot, however, commit waste (except as mentioned, *post*), and must account for the rents he receives, and pay an occupation rent for such part of the premises as he may keep in his own possession. As detailed, *post*, he may appoint a receiver and insure the property, and add the expenses thereof to his debt.

(2.) As to the remedies :

He may bring an action for foreclosure, and may pray a sale, which the Court has now power to direct. (15 & 16 Vict. c. 86, s. 48.) Or he may sell, under his power (if one), or under 23 & 24 Vict. c. 145, in the cases mentioned, *post* ; and the mortgagor's concurrence in such sale is not required. He may also sue the mortgagor on his covenant to pay. All these remedies may be exercised concurrently.

Can a mortgagee in possession, whose estate is absolute at law, cut down timber ?

If the security is insufficient, he may fell timber and sell it towards liquidation of his debt, and may open

mines ; but, with this exception, he may not commit waste.

Mortgagor and mortgagee : what separate right has each to lease the mortgaged premises, and what would be the lessee's tenancy holding a lease from one without the concurrence of the other ?

A mortgagor in possession cannot make a lease so as to bind the mortgagee, unless he have an authority from the mortgagee to do so. On the other hand, the mortgagee, although in possession, cannot make a lease without an express power so as to bind the mortgagor if he should afterwards redeem. But, in each case, such lease is good as between the parties ; both mortgagor and mortgagee should, therefore, join in the lease.

When land mortgaged is held either by tenancy created before the mortgage, or under a demise created by the mortgagor after the mortgage, what are the distinct remedies in each case for the mortgagee's obtaining rent or possession ?

If the tenancy was created before the mortgage, the mortgagee, after giving notice of his mortgage to the tenant, becomes entitled to his rent in arrear at the time of the notice as well as to what accrues afterwards, and he may distrain for it after such notice. (*Moss v. Gallimore*, 1 Sm. L. C. 561.) But if the tenant hold under a lease granted by the mortgagor after the mortgage without the privity of the mortgagee, the latter may eject him without notice. (*Keech*

v. *Hall*, 1 Sm. L. C. 533.) But he cannot, by merely giving the tenant notice, cause him to hold of himself, the mortgagee: a tenancy can only be created by mutual agreement between him and the tenant.

If a mortgage deed contains a covenant for the insurance of the buildings on the premises, and the mortgagor fails to perform that covenant, has the mortgagee, in the absence of any provision for the purpose in the deed, any power to effect an insurance, and to recover the amount, with or without interest?

Yes; provided the mortgage deed was executed after the 28th August, 1860; for it is provided by the Trustees and Mortgagees Act, 1860 (23 & 24 Vict. c. 145), that after any omission to pay any premium or any insurance, which by the terms of the deed ought to be paid by the mortgagor, the mortgagee shall have power to insure the whole or part of the property and add the premiums paid to the principal money secured, at the same rate of interest (s. 11). But this power will not be exercisable if it is expressly negatived by the deed (s. 32).

By the Trustees' and Mortgagees' Act, 1860, what power of sale is given to mortgagees under an instrument executed after the passing of the Act, in what events does it arise, by whom exercisable, and under what restrictions? What are the powers by the Act conferred on mortgagees of appointing a receiver?

(1.) As to the power of sale. The power to sell given by this Act arises (a.) at any time after the

expiration of one year from the day fixed for the repayment of the principal; or (b.), after any interest has been in arrear for six months; or (c.), after any omission by the mortgagor to pay the premium on his insurance. It is exercisable by the person to whom the principal money shall for the time being be payable, his executors, administrators, or assigns. The sale may be of the whole or a part of the mortgaged premises, by public auction or private contract, subject to any reasonable conditions; and with power to rescind any contract for sale, or buy in and re-sell. Such power is only to be exercisable to the same extent (and no more) as if it had been in terms conferred by the party creating the charge; and no sale is to be made until after six months' notice in writing given to the person entitled to the property subject to the charge, or affixed to a conspicuous part of such property. (Ss. 11 and 13.) (2.) On the like events, the mortgagee has power to appoint a receiver of the rents and profits; the person named in the deed is to be appointed, and if none such, the mortgagee, on giving notice to the mortgagor to appoint, and after default by him so to do for ten days, may appoint such person as he thinks fit. (Ss. 11 and 17.)

Can a mortgagee of real estate, without express power, sell the mortgaged property? Does the same rule apply in the case of a mortgage of personal estate?

A mortgagee of real estate can, since the statute 23

& 24 Vict. c. 145, sell the mortgaged property, even though no express power of sale is conferred by the mortgage deed. (See last answer.) Before this Act, he could not sell without express power, except under a decree of the Court of Chancery. A mortgagee of personal estate always could, on due notice, sell the property instead of foreclosing.

Can a mortgagee in fee, after selling the estate, proceed or not on the covenant to pay?

The Court will not prevent a mortgagee from using all his remedies, and exercising all his powers, as and when he pleases, even concurrently. Therefore, after selling under his power of sale, if he does not realize the full amount of his debt, he may sue the mortgagor on his covenant. But if the mortgagee foreclose, and then sell, he will be prevented from suing for the remainder of his debt, because by doing so he opens the foreclosure, and gives the mortgagor a renewed right to redeem, a right of which the mortgagee has prevented him from availing himself, for by selling the estate he has rendered it impossible to restore it on full payment.

A mortgagee in fee dies intestate, in whom do the estate and money vest? and if the mortgagor wishes to pay off the mortgage debt, what assurance, and by whom executed, is necessary for restoring the estate to the mortgagor free from the debt?

If a mortgagee in fee die intestate, the legal estate, which is vested in him, will descend to his heir-at-law; but in equity he has a security only for payment

of the money, the right to which will, in common with his other personal estate, devolve on his executors or administrators, for whom the heir will be a trustee. If the mortgagor wishes to pay off the mortgage debt, a reconveyance, executed by the heirs and executors or administrators of the deceased mortgagee, is the proper assurance, by which the heir reconveys the estate by the direction of the executors or administrators, and the latter give a receipt for the money.

If a freehold estate in mortgage be devised or allowed to descend, is the devisee or heir-at-law entitled to have the mortgage money paid out of the testator's or intestate's personal estate, there being no direction in the deed or will to that effect? and has the law on this point been altered, and when and in what respect?

On the death of a mortgagor, prior to the 31st December, 1854, the devisee or heir was entitled to have the mortgage debt paid out of the personal estate of the deceased. But now, by 17 & 18 Vict. c. 113 (called Locke King's Act), it is provided that, in the absence of a contrary intention, the heir or devisee of the mortgagor shall not be entitled to have the debt discharged out of the personal estate, but the hereditaments charged shall be primarily liable for the payment of the same. And by 30 & 31 Vict. c. 69, a general direction that the debts of the testator shall be paid out of his personal estate shall not be deemed a declaration of an intention contrary to the above rule.

An estate is mortgaged to C. in fee, he enters as mortgagee and then dies, leaving a widow. Is the widow dowable out of this estate ?

She is not, as the wife of a mortgagee is not dowable out of the land in mortgage.

If a mortgage be made to two persons, and one dies, having appointed a third person his executor, can the surviving mortgagee give a valid receipt for the mortgage debt, and reconvey the estate ? and if not, what provision should be inserted in the mortgage deed to enable him to do so ?

It was a rule in equity that where money was advanced by several mortgagees, whether in equal shares or not, they became tenants in common, as it was presumed that it was not the intention of the parties that the interest in the debt should survive ; but, at law, on a conveyance to several persons and their heirs, without any words indicating that they should take in distinct shares, they became joint tenants in every case. By the S. C. J. Act, 1873, s. 25, it is enacted that where there is any variance between the rules of equity and law the rules of equity shall prevail ; therefore, in the case above put, the surviving mortgagee *cannot* give a valid receipt for the debt, and reconvey the estate, for the court will consider the mortgagees to have been tenants in common, and on the death of one the legal estate will remain in the survivor ; he will be considered as a trustee as to a moiety of the money for the personal representatives of

the deceased. To avoid this, a provision should be inserted in the mortgage deed, to the effect that the money is advanced by them on a joint account, and that, in case of the decease of one in the life-time of the other, the receipt of the survivor shall be an effectual discharge for the whole of the money. (See *Lake v. Gibson*, 1 L. C. Eq. 160.)

What is an equity of redemption? and is the party entitled to it for ever, and when barred?

An equity of redemption is the right formerly allowed to a mortgagor, by a Court of Equity alone, to recall or redeem his estate on paying to the mortgagee his principal, interest, and expenses, although the time appointed for the payment is passed, and the mortgagee's estate has thereby become absolute at law. This right to redeem will, since the late Act, be recognised by the Supreme Court in all its divisions.

It is barred at the end of twenty years from the time the mortgagee obtained possession, unless in the meantime an acknowledgment in writing shall have been given by the mortgagee of the right of the mortgagor, in which case the power of redemption is limited to a period of twenty years from such acknowledgment.

A. mortgages freehold estate to B., with power of sale, and dies. B. then exercises his power of sale, and, after retaining principal and interest, there is a surplus. To whom will the surplus belong, viz., to the heir or personal representatives of the mortgagor?

To the heir; for the mortgagor dying before the sale

the equity of redemption descends to his heir, and he is therefore entitled to the surplus.

A. makes a mortgage to B. in fee, and then dies, without heirs and intestate; who is entitled to the equity of redemption of the mortgaged estate?

The equity of redemption does not escheat to the Crown, but belongs to B., the mortgagee, subject to the debts of A., the mortgagor.

In the absence of an express bargain, can a mortgagor pay off at any time his mortgage debt, and can a mortgagee call in his mortgage money at any time?

After the day fixed for payment is passed, the mortgagor cannot pay off his debt without giving to the mortgagee six calendar months' previous notice in writing of his intention; and he must then punctually pay or tender the money at the expiration of the notice, otherwise the mortgagee will be entitled to fresh notice. A mortgagee can at any time after default call in his mortgage money without notice.

A. is mortgagee in fee, and dies without devising the security, and the mortgage debt is applicable by his executor to the payment of the testator's debts, suppose the heir-at-law of the mortgagee to be unwilling or incapable to reconvey the premises (as if he be an infant), to whom is the mortgagor to pay the principal money and interest, and how is he to obtain an effectual reconveyance of the premises?

In such a case, the Court is empowered to make a vesting order, which will have the same effect as a

reconveyance duly executed by the heir ; or, if more expedient, the Court will appoint some person to execute a proper reconveyance. (13 & 14 Vict. c. 60.)

This jurisdiction was formerly vested in the Court of Chancery, and therefore the application must now be made to the First Division of the Supreme Court.

What is the effect of cancelling or destroying a mortgage deed ?

If a mortgage is cancelled by a mortgagee, and it is so found in his possession on his death, it is as much a release as cancelling a bond. But it does not convey or revest the estate in the mortgagor, for that must be done by some deed ; the legal estate in such a case descends upon the heir. But, there being no debt at law, or in equity, at least upon the mortgage, the Court holds the heir to be a trustee for the mortgagor.

Mortgage to A. for £1000, then to B. for £800. A. sells his charge to C., a stranger, for £700. Is C. entitled, as against B., to the whole debt of £1000, or only to the £700 paid ?

C. will be entitled to the whole debt of £1000 ; for, being a stranger, he is entitled to the full benefit of his purchase. If C. were a trustee for the owner of the estate, he would be held to have made the purchase for the benefit of the estate, and would be entitled only to the £700, the amount he actually gave. So, also, in the case of a purchase by a heir-at-law, or executor of the owner, nothing beyond the amount of the purchase

owner, nothing beyond the amount of the purchase could be claimed to the prejudice of the second mortgagee.

What are the prominent disadvantages of a second mortgage, especially in the event of foreclosure or sale, and considering the danger of tacking? Give your reasons.

With respect to foreclosure, a second mortgagee is only able to foreclose subject to the debt of the first mortgagee, and, in the case of a sale, he is entitled only to the surplus after payment of principal, interest, and costs in full to the first mortgagee. There is also the risk of some third mortgagee getting in and *tacking* the first mortgage; and, besides this, there is this further danger, that if the mortgagor should have mortgaged some other estate to some other person for more than its value, the holder of the deficient security may take a transfer of the first mortgage, and consolidating his own security with it exclude the second mortgage.

What is meant by "tacking" a mortgage, and how can this be effected?

"Tacking" is the uniting of two incumbrances, in order to postpone an intermediate one, which is prior in point of time to the incumbrance tacked. Thus, if a third mortgagee, having advanced his money without notice of a second mortgage, afterwards buy in a first mortgage, even though he then have notice of the second, yet having obtained the first mortgage, and having the law on his side, and equal equity, he can

tack his third mortgage to the first, and thereby squeeze out and gain priority over the second mortgage. (*Marsh v. Lee*, 1 L. C. Eq. 550.)

Where there are three mortgagees, can the third in any, and what, manner protect himself against the second, and will the fact of his having had notice (when he advanced his money) of the second mortgage interfere with such protection ?

As, shown in the last answer, a third mortgagee, provided he had no notice, when he advanced his money, of the second mortgage, can, by buying in the first mortgage, gain priority over the second ; but if he had such notice he will not be allowed to tack.

A. mortgages land to B. to secure £1000 advanced at the time, and also future advances, and subsequently A. mortgages the same land to C. to secure a present advance. C. gives B. notice of his mortgage. If B. afterwards makes A. a further advance, will that advance rank in priority to C.'s mortgage ?

It is now decided that B. in such a case having had notice of the second mortgage cannot tack his further advance to the original sum lent, and thus gain priority over C., although the mortgage was made to cover future advances.

Can an advance on judgment, subsequent to a second mortgage, be tacked to a prior security, so as to have priority in payment to the second mortgage ?

If a first mortgagee who has the legal estate, lends to the mortgagor a further sum on a judgment, or even on

note, and it is distinctly agreed at the time to be on the security of the mortgaged property, he will be entitled to retain till both sums are paid, as against a mesne mortgage, of which he had no notice at the time of the further advance.

In a register county, does registration of a second mortgage amount to notice thereof?

No, it does not. The mere registration of a second mortgage will not prevent a prior mortgagee from taking a third mortgage when he had no actual notice of the existence of the second.

Can a first mortgagee, purchasing and taking a conveyance to himself in fee of the equity of redemption, set up his mortgage against any of the subsequent incumbrances of which he has notice?

If a first mortgagee buy the equity of redemption he lets in the second mortgagee, and cannot set up his own debt, unless he purchased without notice of the second mortgage and for valuable consideration, in which case he should have his debt assigned to a trustee with a declaration of his intention to keep it alive in order to prevent it merging in the fee; but although there may be no such express declaration, if the intention to keep the charge alive be clear it will not merge in equity, and, since the S. C. J. Act, 1873, not at law. (S. 25.) (*Forbes v. Moffatt* L. C. Con. 837.)

If A. mortgages Y. estate to B. for £1000, and Z. estate to B. for £2000, can A., adversely to B., redeem either estate upon paying the money due upon it, or

must he redeem both estates ; and does the same rule apply to proceedings by B. for foreclosure ?

In such a case, B., the mortgagee, is placed in the same position as if the whole of the lands, both Y. and Z. estates, had been mortgaged to him for the sum total of the money advanced, viz., for £3000. A. cannot, therefore, redeem either estate without also redeeming the other ; and this whether the action is by A. for redemption, or by B. for foreclosure.

If A., having two estates, Blackacre and Whiteacre, first mortgages Blackacre to B., and subsequently mortgages Whiteacre to him to secure another sum, and then conveys the equity of redemption of Blackacre to C., subject to the first-mentioned mortgage, will C. acquire a title unaffected by the money secured upon Whiteacre ?

Although C. purchased the equity of redemption of Blackacre without notice of the mortgage of Whiteacre, still he is affected by it, and cannot redeem the former estate without also redeeming the latter ; for B. has a right to consolidate his two mortgages, so as to insist on both being paid off together.

Explain what is meant by the term equitable mortgage.

An equitable mortgage is such a charge as was formerly recognised and enforced only in a Court of Equity, and not noticed at law, the estate and interest created thereby being purely equitable. Since the S. C. J. Act, 1873, the Supreme Court, and every

Judge thereof, will give the same relief to the mortgagee as, before the Act, was given by the Court of Chancery ; but the estate of the mortgagee is still in its nature equitable, the legal estate in the mortgaged premises remaining in the mortgagor.

What is required to constitute an equitable mortgage?

An equitable mortgage may be created (1) by an agreement or direction in writing, showing the debtor's intention to make his land or property a security for the debt ; or (2), notwithstanding the 4th section of the Statute of Frauds, by a mere deposit of title deeds without any writing whatever.

Will a deposit of deeds, without writing, create a security? If so, may the object of the deposit be explained by parol evidence?

Yes ; see last answer. The object of the deposit may be explained by parol evidence.

Will an equitable mortgagee, by deposit, have preference over a subsequent purchaser or mortgagee of the legal estate, with or without notice of such equitable mortgage? Is a written memorandum essential or advantageous?

He will have preference over a subsequent purchaser or mortgagee of the legal estate *with* notice ; but not over a subsequent purchaser or mortgagee who has the legal estate, and had no notice of such equitable mortgage. Writing is not essential, as parol evidence is admissible to show the object of the deposit ; but it is advisable, as it facilitates proof.

When does a judgment at law become a charge upon real estate ?

Under the Statute 13 Edw. 1, c. 18, a creditor who had obtained judgment of a Court of Law against his debtor was empowered, under a writ called a writ of *elegit*, to take one-half of the lands of his debtor until his debt was levied. And, by 1 & 2 Vict. c. 110, he is empowered to seize the whole of his debtor's lands ; and the judgment, if duly registered, was made a charge upon the lands, even if in the hands of purchasers and mortgagees. But now, by a recent Act, although a judgment creditor is still entitled to seize his debtor's land, the judgment will not be a charge upon the lands until they are actually taken in execution thereunder. (27 & 28 Vict. c. 112.)

Are freehold and copyhold estates liable to judgment debts ; if so, what proceedings are necessary thereunder ?

Both freeholds and copyholds are liable to be taken in execution for judgment debts.

If the judgment were entered up after the 23rd July, 1860, and before the 29th July, 1864, in order to bind lands in the hands of purchasers and mortgagees (with or without notice), it must be registered, and a writ or other process of execution must be issued and registered before the execution of the conveyance or mortgage, and such execution must be put in force within three calendar months from the time when it was registered. (23 & 24 Vict. c. 38.)

But a judgment entered up after the 29th July, 1864, will not affect any land, of whatever tenure, until such land shall have been actually delivered in execution by virtue of a writ of *elegit*, or other lawful authority, in pursuance of such judgment; and every such writ must be registered in the name of the debtor; but no prior or other registration of the judgment is necessary for any purpose. (27 & 28 Vict. c. 112.)

When do judgments bind leasehold estates, and where should searches be made as to such incumbrances?

Leasehold estates are subject to judgments in the same manner as freeholds. Search should be made in the Third, or Common Pleas, Division of the Supreme Court.

If a judgment has been entered up against a man seised in fee of lands for a debt, how is such judgment to be enforced?

By suing out a writ of *elegit*, and obtaining possession from the sheriff thereunder. The writ should then be registered, so as to bind all purchasers and mortgagees. The creditor can then, by petition to the Court, in a summary way obtain an order for the sale of the debtor's interest in such land.

A. has a decree of the Court of Chancery against B. for the payment of a sum of money; how is A. to make that sum a charge upon B.'s estate, and under what authority?

By issuing and registering due process of execution, as mentioned in the last answer ; for the term " judgment " includes decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment.

By what recent Act, and under what regulations, do judgments and processes of execution thereon affect purchasers and mortgagees ?

As before mentioned, by the Statute 27 & 28 Vict. c. 112, no future judgment will affect purchasers or mortgagees unless the creditor has issued and registered a writ of execution, and obtained possession thereunder.

In what case does a judgment against a tenant in tail bind his issue and the remainderman ?

It was enacted by 1 & 2 Vict. c. 110, that any judgment, &c., should bind the land of the debtor as against the issue of his body, and also all persons whom he might, without the assent of any other person, cut off and debar from any remainder or reversion ; but now, as we have seen, no judgment, &c., can affect any land until such land is actually delivered in execution.

Do judgments against a mortgagee affect the mortgaged estate in the hands of a purchaser from the mortgagor, who pays off the mortgage out of the purchase money ; and does notice to the purchaser of the judgment, prior to the completion of the purchase, make any difference in such a case ?

It was expressly provided by 18 & 19 Vict. c. 15, that the lands in such a case should be discharged both from the judgment and Crown debts of the mortgagee; and it makes no difference if the purchaser has notice of the judgment.

Can a person, having an absolute power of appointment over real estate, defeat judgments entered up against him, subsequently to the vesting of such power in him, in any and what way? And state the reason for your answer.

By 1 & 2 Vict. c. 110, judgment debts were made binding on all lands over which the debtor should at the time of the judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit. If, therefore, the judgment creditor has sued out and registered execution, and taken possession thereunder, his right cannot be defeated by an exercise of the power.

ESTATES IN POSSESSION, REVERSION, AND REMAINDER.

What are the several kinds of estates with regard to the time of their enjoyment?

They are either in possession or expectancy.

What is an estate in possession?

An estate is said to be in possession when a man is entitled immediately to the possession by virtue of any of the estates and interests before considered.

Of what sorts are estates in expectancy?

There are at common law two sorts, one called a version, the other a remainder.

What is an estate in reversion?

Where any estate is derived, by grant or otherwise, out of a larger one, leaving in the original owner an ulterior estate immediately expectant on that which is so derived, such ulterior interest is called a reversion.

Explain the phrase "particular estate."

"Particular estate" is the small part, or *particula*, derived by grant or otherwise out of a larger estate, leaving in the original owner a reversion expectant thereupon, as described in the last answer. Thus, upon the creation by the owner of the fee of any estate for life, or years, the residue of the fee undisposed of is the reversion expectant upon the particular estate for life or years so created.

What is an estate in remainder? and what are the different kinds?

An estate in remainder is where any estate is granted out of a larger one, an ulterior estate, immediately expectant on that which is so granted being at the same time conveyed away by the original owner. The first estate so granted is (as before explained) called the particular estate, and the ulterior one the *remainder*. Remainders are either vested or contingent.

What is a vested remainder?

A *vested* remainder, or remainder *executed*, is where the estate is invariably fixed to remain to a determinate person after the particular estate is spent. As, if A. be tenant for twenty years, remainder to B. in fee : here B.'s is a vested remainder.

What is a contingent remainder? Show the technical creation of one?

Contingent or *executory* remainders are those limited either to an uncertain person (*i.e.*, to a person not *in esse*, or not ascertained), or upon an uncertain event (*i.e.*, one which may not happen at all, or not until after the particular estate is determined), as, for instance, a limitation to A. for life, remainder to the first son of B., who has no son born ; this is a contingent remainder, for the person to whom it is limited is not *in esse*.

Can the owner of an estate in fee-simple in land convey the land to A., a bachelor, for life, with remainder to his son for life, and if not, why?

He can. By such conveyance A. will become entitled for life with a contingent remainder to his unborn son for life, leaving an ultimate reversion in fee-simple in the grantor.

A testator devises real estate to A. for life, with remainder over to A.'s first and other sons successively, in tail male, with remainder over to testator's own right heirs. Under such a devise, when does the ultimate remainder become vested in the heirs of the testator, viz., at his (the testator's) decease, or at the time of the failure of the prior limitations?

The ultimate remainder becomes vested in the heirs of the testator at his, the testator's decease.

Will a chattel interest support a remainder?

It will support a vested remainder, as before pointed out. An estate at will, however, is not held to be such a particular estate as will support a remainder. And, in the case of contingent remainders, if they amount to a freehold, they cannot be limited after an estate for years, or any other particular estate than a freehold.

A., on his marriage, limited a freehold estate to the use of himself for life, with remainder to the use of his first and other sons successively, in tail, with remainder to the use of B. in fee. Are either, and which, of the above remainders vested or contingent?

The remainder to the use of the unborn sons in tail is a contingent remainder, as before explained. The remainder to B. in fee is vested.

An estate is limited to A. for life, with remainder to the first and other sons of B. in tail, with remainder to C. in fee. A. dies, leaving B. and C. surviving, but B. is still unmarried, to whom does the estate devolve?

It is a rule that every contingent remainder must become vested either during the continuance of the particular estate, or *es instanti*, that it determines. In the case supposed, therefore, B. being still unmarried at the death of A., the contingent remainder to B.'s unborn sons in tail is destroyed, and the estate devolves on C.

Why were limitations to trustees to preserve contingent remainders formerly necessary, and why are they no longer required?

So long as a remainder was in contingency, it always required the continuing support of a particular estate of freehold, so that if that estate came by any means to an end before the contingency happened, the remainder was altogether defeated. Thus, if lands were conveyed to A. for life, with remainder to his unborn sons successively in tail, with remainder over, if A.'s life estate were destroyed by forfeiture, or merger, before he had a son born, the remainder to his son was defeated. In such cases, therefore, it was necessary to have trustees appointed to preserve the contingent remainders, in whom there was vested an estate in remainder for the life of the tenant for life, to commence when his life estate determined otherwise than by his death. This is no longer necessary, for by 8 & 9 Vict. c 106, s. 8, a contingent remainder shall be capable of taking effect notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened.

In limitations in strict settlement, was the estate limited to trustees to preserve contingent remainders vested or contingent?

The estate given was vested, it being always ready to come into possession the moment the prior life estate was determined. (See last answer.)

State the difference between a remainder and a reversion.

They differ in this respect, that a reversion is an estate left in a grantor, by act or construction of law, as part of his former estate, but a remainder is an estate newly created by the act of the grantor. Again, the tenant of a particular estate holds of the reversioner by fealty and rent, but between the owner of the particular estate and the owner of the remainder no tenure exists.

State the rule in Shelley's Case, and where is it found?

Wherever a man by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, the word "heirs" is a word of limitation, and not of purchase. It is reported in 1st Cokes' Report, 104.

If real property be limited to A. for life, remainder to B. for life, remainder to the right heirs of the body of A., with remainder to the right heirs of B., what estate do A. and B. take respectively?

A. will take an estate tail, subject to B.'s life estate, and B. will take the remainder in fee, under the rule in Shelley's case.

What are the requisites to produce a merger of an estate?

The requisites are—

(1.) That a greater and less estate coincide and meet in one person.

(2.) That they come to one and the same person in one and the same right.

(3.) That no intermediate estate intervene. By the S. C. J. Act it is provided that, after the 2nd November, 1874, there shall not be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

What is meant by the merger of a term of years?

If the reversion in fee simple descend to, or is purchased by, a tenant for a term of years, the term is merged in the inheritance.

If a tenant for years dies, having appointed the person who is seised of the immediate freehold to be his executor, will the term merge or not? Give a reason for your answer.

The term will not merge, for he hath the fee in his own right, and the term of years in the right of the testator.

An estate is granted to A. for 1000 years, subject thereto to B. for life, remainder to C. in tail, with reversion to C. in fee. To whom should the term be surrendered for the purpose of merging it?

To B., the tenant for life, as he has the first estate of freehold.

Will a term, under any circumstances, merge in a term of shorter duration?

Yes; a term of years will merge in the immediate reversion, though that be a chattel interest, and though

the term in reversion be of shorter duration than the term on which it is expectant; for merger is not confined to cases where one of the coinciding estates is greater than the other in point of quantity of interest.

A. has a lease for 30 years, and the same lessor makes another lease of the same property to B. for 60 years, the lessor afterwards sells and conveys the freehold to C., and it becomes necessary to merge the 30 years' term, how is this to be effected?

A. can surrender his term to C., and it will then merge in the freehold, for B. has merely an *interesse termini*, which is not a sufficient estate to prevent merger.

If a tenant in tail becomes also possessed of the immediate remainder or reversion in fee expectant on the determination of his estate tail by failure of his own issue, will the estate tail merge in the fee? State the reasons for your answer.

It will not, although it is a less estate; for estates tail are protected and preserved from merger by the operation and construction, though not by the express words, of the Statute *de Donis*.

What is understood by "uses" in strict settlement?

Where land is settled to the use of the parent for life, with remainder to the use of the first and other sons or children in tail, this is called a strict settlement.

In what session of the present reign was the Succes-

sion Duty Act passed? How does this effect the title to be shown to real estate?

This Act was passed in the 16th and 17th session of the present reign. The duty thereby imposed is a first charge on the property, and every person in whom the same is vested by alienation or otherwise is personally accountable to the Crown for the duty. But every receipt purporting to be a discharge for the whole duty exonerates a *bond fide* purchaser for value, without notice, notwithstanding any mis-statement in the account.

State in general, but accurate, terms what is a succession within the Succession Duty Act, 1853, and the description of property charged; say if leaseholds are treated as real or personal property. Give an instance or instances of succession whereon the duty attaches. Say how far the duty attaches on interests aliened before the succession takes effect. By what rule is the value of the succession measured? How does the charge affect alienees by titles arising after the duty attaches, and that in the cases of property, real and personal respectively, and what power is there of making separate assessments so as to discharge portions of property from the liability?

Every past or future disposition of property (real or personal) by which any person becomes beneficially entitled to any property or income upon the death of any person dying after 19th May, 1853, and every devolution by law of any beneficial interest on any

such death, is deemed to confer a succession. (S. 2.) Leaseholds are treated as real estate. (S. 1.) Thus, if lands are devised by will or descend to an heir at law, succession duty attaches. If a succession is aliened before the successor is entitled in possession, the same duty is payable as if no such alienation had been made. (S. 15.) The interest of a successor is considered to be of the value of an annuity for his life, equal to the annual value, or the annual produce of the property. (Ss. 21, 30.) The duty is a first charge on the interest of the successor in the real property, and of all persons claiming in his right, and in his interest in the personal property while in his control, or in the control of any trustee, guardian, &c., for him. (S. 42.)

Upon application, separate assessments can be obtained of the duty on separate properties, or portions of property, and such property or portions will be chargeable only with the duty assessed thereon. (S. 43.)

Mention four distinct and different cases of succession duty.

Besides the two instances mentioned in the last answer, the following are instances:—(1.) Where a beneficial interest accrues to one of several joint-tenants by survivorship. (2.) Where a person has a general power of appointment under a disposition taking effect on the death of a person, and appoints thereunder.

If a person who is tenant for life of property under a will dies before all the instalments of succession duty are paid, what is the effect with regard to the unpaid instalment, and what the effect where the person who is entitled to the fee-simple dies before all the instalments are paid?

The instalments unpaid by the tenant for life cease to be payable on his death. But those unpaid by the tenant in fee-simple remain as a continuing charge on the property.

What provision does the Succession Duty Act contain with regard to timber on an estate?

Where timber, trees, or wood (not being coppice or underwood) are comprised in a succession, the successor is chargeable with duty upon his interest in the net moneys (after deducting all necessary outgoings for the year) received from time to time from any sales of such timber, &c., and must account for and pay the same yearly. No duty is payable unless the net moneys exceed £10 per annum, and the successor may commute the duty. (S. 23.)

Land is settled to A. for life, remainder to B. in fee. B. dies in A.'s lifetime, before the Succession Duty Act, and devises the reversion to trustees in trust for sale, money to be in trust for B.'s wife for life, and after her death for his children. A. dies after the passing of the Succession Duty Act. Is the life interest of B.'s wife liable to succession duty or not? State your reason.

Yes; for where reversionary property is vested by alienation, or any title not conferring a new succession in a person other than the person originally entitled thereto, the same duty is payable as if no such alienation had been made. (S. 15.) If B. had survived A., he would have had to pay duty, but he having died and devised his reversion to his wife for life, she stands in his place, and must pay duty on the value of her life interest.

ESTATES IN SEVERALTY, JOINT TENANCY, COPARCENARY
AND TENANCY IN COMMON.

What is an estate in severalty?

An estate in severalty is where the owner is sole tenant, and holds the lands in his own right only, without any other person being joined or connected with him in point of interest during his estate therein.

Who are joint tenants, and why are joint tenants so called?

Where an estate is acquired by two or more persons in the same land by the same title (not being a title by descent), and at the same period, and without any limitation by words importing that they are to take in distinct shares, they are called joint tenants. They are so called to signify the union or conjunction of their interest; as among joint tenants there is always

unity of possession, of interest, of title, and of time in the commencement of their title.

A. and B. are joint-tenants in fee; A. devises his real estate and dies before B., is the joint estate severed by the devise?

No; a devise by a joint tenant of his share by will is no severance of the jointure, the *jus accrescendi* being preferred *ultimæ voluntati*.

When two persons, not being partners, purchase an estate out of their own money in equal shares, and take a conveyance of the estate simply to themselves in fee, what is the effect of this conveyance at law and in equity?

When two or more persons purchase land and advance the money in equal proportions, and take a conveyance to them and their heirs, this is a joint tenancy. But if the proportions are not equal, and this appears in the deed itself, this makes them in the nature of partners, and they will be considered as tenants in common. This was the rule in equity. (*Lake v. Gibson*, 1 L. C. Eq. 160.) At law they were considered joint-tenants in each case; and, since the S. C. J. Act, where there is any variance between the rules of Equity and the rules of Common Law, the former shall prevail.

What is the distinction between a joint-tenancy and a tenancy by entireties?

Joint-tenants are seised *per my et per tout*, i.e., as well of every parcel as of the whole, and each may

dispose of his own share as he likes ; whereas, in the case of tenancy by *entireties*, which is an estate given to a man and his wife, who are in law considered as one person, the tenants are seised *per tout et non per my*, that is, both are seised of the entirety, but cannot take the estate by moieties : the consequence of this is that neither husband nor wife can dispose of any part without the assent of the other.

If land should be given to A. and B., man and wife, and their heirs, what would their estate be called ?

An estate by entireties, as stated in the last answer.

If there be three joint-tenants in fee-simple, and one of them releases his share to another of the three, what is the effect of such release, and what are the estates or interests of the various parties after such release ?

If one of three joint-tenants releases his share to one of his companions, though the jointure is destroyed as to that part, yet the two remaining parts are still held in jointure, consequently after such release the two remaining tenants will hold two-thirds of the property as joint-tenants, and the tenant to whom the share of the first was released will hold the remaining one-third as tenant in common with his companion.

A., B. and C. are brothers, A. being the eldest. B. and C. become joint-tenants of lands in fee-simple. B.,

without C.'s knowledge, conveys his undivided moiety in fee to D., by way of mortgage, B. then dies, does C. on B.'s death take the entirety, or does a moiety (subject to the mortgage) descend on A., as B.'s heir-at-law?

A moiety (subject to the mortgage) will descend to A., for the mortgage being an absolute conveyance, severs the joint-tenancy; had B. created a mere charge on the estate, C. would have taken the entirety on B.'s death by right of survivorship, for *jus accrescendi præfertur oneribus*.

How is an estate in coparcenary created, and what persons are usually coparceners?

An estate in coparcenary is where lands of inheritance descend to two or more persons; thus it can only arise by *descent*. Females are usually coparceners.

Of what two sorts are coparceners? Why are they called coparceners?

An estate in coparcenary arises either by common law or by particular custom. By common law, as where a person seised in fee-simple or fee-tail dies, and his next heirs are two or more females, as daughters, sisters, aunts, cousins, or their representatives: in this case they shall all inherit. Coparceners by particular custom are where lands descend, as in gavel-kind, to all the males in equal degrees, as sons, brothers, uncles. According to Lyttleton, parceners are so called because one could always constrain the others to make partition; and this is the only kind of joint-tenancy where this is the case by the common law.

What is a tenancy in common, and how may it be created?

A tenancy in common is where two or more hold the same land with interests accruing under different titles, or accruing under the same title (other than descent), but at different periods, or conferred by words of limitation importing that the grantees are to take in distinct shares; it may be created by the destruction of an estate held in joint-tenancy, or of one held in coparcenary, or by special limitation.

Do estates held in joint-tenancy, tenancy in common, and coparcenary, differ in any, and what, essential particulars?

Yes, in many essentials; in fact, the only feature common to all is unity of possession: they all hold the lands *pro indiviso*, or promiscuously. Among *joint-tenants* there is unity of interest, title, and time of commencement of title; and, as a consequence of this entirety of interest, the joint estate is subject to the *jus accrescendi* or right of survivorship. No dower or curtesy can be claimed out of a joint estate, and one tenant cannot defeat the right of his companions to succeed to the whole on his death by devising his share by will. Among *coparceners* there is the same unity of title and similarity of interest, but that interest may accrue at different periods, and their shares may not be equal. There is no entirety of interest amongst them, and therefore no *jus accrescendi*.

Among *tenants in common* there is not necessarily

any unity of title or time in the vesting, nor any similarity or equality of interest, and no right of survivorship; dower and curtesy can be claimed out of estates held in common. Both coparceners and tenants in common can dispose of their shares by will.

Distinguish an estate held in joint tenancy and coparcenary as to the inheritance.

On the death of one joint-tenant the entire tenancy remains to the survivors, and at length to the last survivor; but, in the case of coparceners, each part descends severally to their respective heirs.

A testator devises land to A. and B., and their heirs. A. dies intestate, leaving a son, and afterwards B. dies intestate, leaving two daughters, one of whom dies intestate leaving a son, who can convey the land to a purchaser?

The surviving daughter of B. and the son of the deceased daughter must convey, for the devise to A. and B. and their heirs made them joint-tenants in fee-simple. On A's death, B. took the whole, and was succeeded by his two daughters as coparceners. On the death of one, her share descended to her heir—her son. (See last answer.)

A. and B. are seised in fee of three estates, numbered 1, 2, 3. They hold estate No. 1 as tenants in common, the estate No. 2 as joint-tenants, No. 3 as coparceners. Can A. and B., or either of them, by will, devise their undivided shares in these three estates, or any, and if any, which of them?

Both A. and B. may devise his or her undivided share in estates Nos. 1 and 3, for there is no entirety of interest among coparceners and tenants in common, each being entitled to a distinct share; but a devise by either of estate No. 2 would be inoperative so long as the joint-tenancy continues, for the *jus accrescendi* is preferred *ultimæ voluntati*.

If joint-tenants make a demise, what tenancy has the lessee, and what tenancy has he if the demise is by tenants in common?

Joint-tenants having an entirety of interest, a lease by them operates as a joint demise of the whole; but if tenants in common join in making a lease, it operates as a separate demise of each share.

How may a joint-tenancy, or a tenancy in common, be severed?

A joint-tenancy may be severed—(1), by partition; (2), by alienation without partition, as if one joint-tenant conveys his estate to a third person, and creates a tenancy in common; (3), by an accession of interest; thus, if there be two joint-tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure.

A tenancy in common may be dissolved—(1), by partition; (2), by uniting all the titles and interests in one tenant by purchase or otherwise, which brings the whole to one severalty.

Can one tenant in common of a single house, or of a single field, separate his interest from that

of the other tenant in common, and how in each case?

Yes; he can obtain partition, for it has been decided that the inconvenience or difficulty in making a partition is no objection to a decree. Thus, in the case of *Turner v. Morgan*, there was a decree for a partition of a single house; after the commission had been executed, an exception was taken by the defendant on the ground that the commissioners allotted to the plaintiff the whole stack of chimneys, all the fire-places, the only staircase, and all the conveniences in the yard, but the exception was overruled. (Notes to *Agar v. Fairfax*, 2 L. C. Eq. 429.) Since 31 & 32 Vict. c. 40, the Court would decree a sale in such a case.

What are cross-remainders? Can they be implied in a deed or will?

Where lands are given to two or more as tenants in common, and a particular estate is limited to each of the grantees in his share, with remainder over to the other or others of them; as if a man gives lands to his two children as tenants in common or in tail, and directs that on failure of the issue of one of them his share shall go over to the other in tail, and *vice versa*; such ulterior estates are called cross-remainders, because each of the grantees has reciprocally a remainder in the share of the other. In a deed they can be given only by express limitation, and can never be implied; but in wills they may be raised not only by actual limitation, but also by any expression from

which the design to create them can be reasonably inferred.

USES AND TRUSTS.

What is the difference between uses and trusts ?

Uses and trusts were in their origin closely united, if not identical. A use was where one person held land for the benefit of another generally ; the interest of the latter was called a use, and was wholly distinct from the legal estate, and was in its nature exclusively equitable. Since the Statute of Uses the use is now executed or transferred into possession, and the legal estate is vested in the *cestui que use*. The word "trust" formerly applied to every case where a use was created as well as to other confidences, now only to such confidences not involving a use which is executed by the statute. It may be defined to be the equitable or beneficial interest in or ownership of real or personal estate unattended with the possessory and legal ownership thereof.

Why and how did the Statute of Uses fail to accomplish its intended object, and what bearing had its failure on the modern jurisdiction of the late Court of Chancery ?

It failed to do so because it was held in *Tyrrell's Case* that the Statute of Uses (27 Hen. 8, c. 10) only executed the first use, and that if a use was limited or engrafted upon a use, the statute did not execute the latter use. The Court of Chancery then interfered, on

the ground that it was inequitable that the plaintiff to whom the use was last declared should be deprived of the estate which was intended solely for his benefit ; it therefore constrained the party to whom the law had given the estate to hold in trust for the party to whom the use was last declared, and hence the doctrine of uses and trusts.

Give the form of expression by which, in one instrument, a legal estate in fee-simple, and an equitable estate in fee-simple respectively, may be conferred in the same land.

To A. and his heirs to the use of B. and his heirs in trust for C. and his heirs. B. takes the legal and C. an equitable estate in fee-simple.

What is the difference between a conveyance of land to A., in trust for B., and a conveyance to A. for the use of B. ?

There is no difference ; in each case the use is executed by the statute in B., who takes both the legal and equitable estate. The words "upon trust" or "upon confidence" have the same effect as the words "to the use," as they are all mentioned in the statute.

A feoffment or grant to A. and his heirs, to the use of B. and his heirs, what estates, legal and equitable, do A. and B. take respectively ?—and explain the operation of the Statute of Uses in the above limitation ?

A. takes nothing, B. an estate in fee-simple absolute ; for on such a feoffment the Statute of Uses

immediately executes the use declared to B., *i. e.*, transfers it into possession, and B. is *eo instanti* invested with a legal estate in fee-simple in possession without livery of seisin or other ceremony.

Settlement of fee-simple estates to the use of A. for life, remainder to the use of B. and his heirs, in trust for C. and his heirs. Do B. and C. respectively take legal or equitable estates, and to whom must A. surrender his life estate, in order to cause its merger?

B. takes the legal estate in fee-simple in remainder expectant upon A.'s life, but he holds in trust for C., who has an equitable estate to the same extent: A. must therefore surrender his life estate to B. in order to cause its merger.

A., by bargain and sale, conveys a fee-simple estate to B. and his heirs, to the use of C. and his heirs. What estates, legal or equitable, do B. and C. respectively take?

B. takes the legal, C. the equitable estate in fee-simple; for as the use is limited to B. by the effect of the bargain and sale, the use declared to C. and his heirs is a use upon a use, which is a mere nullity at law, and is not executed by the statute. It is therefore only a trust equitably enforceable. (*Tyrrell's Case*, 1 L. C. Con. 274.)

A., by bargain and sale duly enrolled, conveys to B. and his heirs, to the use of C. and his heirs, in trust for D. and his heirs. What estates or interest do B., C., and D. respectively take?

Here, by the effect of the bargain and sale, the use is limited to B. and his heirs, who therefore has the legal estate. He, however, holds merely in trust for the person in whose favour the trust is last declared—in this case D. and his heirs; D., therefore, has an equitable estate in fee-simple, and C. takes nothing.

Feoffment to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs. Explain the operation of the Statute of Uses, in the above limitation.

On such a feoffment an estate in fee-simple in possession is *eo instanti* vested by force of the statute, and without livery of seisin, in B., and A. takes nothing. And as at law there cannot be a use upon a use, C. has an equitable estate only.

In whom would the legal estate vest under a statutory release and grant to C. and his heirs, to the use of D. and his heirs?

The legal estate would vest in D. and his heirs, and C. would take nothing.

Conveyance unto and to the use of A., B., and C. and their heirs. What estates do they respectively take?

They are legal and equitable joint-tenants in fee-simple.

Where land is conveyed "unto and to use of A. and his heirs, upon trust for B., his heirs, and assigns," is A. in by the common law or the statute?

By the Common Law; for it is held that in order to

create a use under the statute, the seisin must be vested in a different person from the *cestui que use* himself, as otherwise the case does not arise of one person seised to the use of another. But though the first use is not such an one as the statute executes, yet there cannot be a use upon a use, whether the statute executes the first use or not, and therefore the interest of C. is not a use executed, but a trust.

Suppose a feoffment made to T. S. and his heirs, to the use of A. for life, with remainder to the use of his first son (unborn) in tail, with remainder to the use of B. in fee, does any, and what, estate remain to T. S. until the birth of a son to A. ?

In such a case it was held that although no actual seisin remained in T. S., yet there was a *scintilla juris*, or possibility of seisin, vested in him to serve the future uses as they came into *esse*. But it is now enacted by 23 & 24 Vict. c. 38, that all uses under any instrument, whether express or implied by law, and whether immediate, or future, or contingent, or executory, shall take effect as they arise by force of the seisin originally vested in the person seised to uses; and the continued existence in him or elsewhere of any seisin to uses or *scintilla juris* shall not be necessary to give effect to such uses.

Suppose T. S. makes a feoffment to the use of A. for life, with remainder to the use of the heirs of his (T. S.'s) body; does any, and what, estate exist in T. S., and distinguish between the above case and

that of a feoffment by T. S. to the use of A. for the life of him (T. S.), with remainder to the use of the heirs of his (T. S.'s) body ?

In the first case there will be a resulting use to T. S. in remainder for his life, which, uniting with the remainder to the heirs of his body, makes him, under the rule in *Shelley's Case*, tenant in tail in remainder expectant on A.'s life estate. The reversion in fee-simple expectant on this estate tail also remains in T. S. But the resulting use is excluded when the use is declared to another person for the life of the grantor, so that in the second case, where T. S. makes a feoffment to the use of A. for the life of him (T. S.), with remainder, &c., A. has an estate for the life of T. S., and the remainder to the heirs of the body of T. S. is contingent, and will vest (if it vest at all) as an estate tail, in the person who is T. S.'s heir at his death. The reversion in fee-simple remains as before in T. S. the grantor.

Devise since the Wills Act to A. and his heirs, in trust, to apply the rents for specified purposes for a limited time, and then in trust for B. and his heirs, in whom is the legal estate ?

A., being a trustee, with an active duty to perform, takes the legal estate, but one only commensurate in duration with the period during which such duties are to be performed. On the expiration, therefore, of the time limited for the receipt and application of the rents by A., the legal estate is, by force of

the Statute of Uses, shifted from A. and transferred to B.

Where an estate is devised to A. and his heirs, in trust, to permit B. and his heirs to receive the rents and profits, what estate does B. take ?

B. will take the legal estate, for the use is executed in him, as A. has no active duty to perform.

In a devise of real estate to the use of A. in fee, in trust for B. in fee, A. by deed disclaims the estate, what is the effect of such disclaimer, viz, does it vest the estate in the testator's heir or in B., and who can convey the land to a purchaser ?

The effect of the disclaimer by A. is to take from him all estate and interest under the will. The legal estate, therefore, devised to him will vest in the heir-at-law of the testator, and he must join with B., who has the equitable fee, in conveying to a purchaser.

How does notice of a trust affect a purchaser for valuable consideration ?

He will take, subject to the trust, except in cases within the statute, 27 Eliz. c. 4.

Can a trustee for sale become a purchaser in any, and what, case ?

No: a purchase by a trustee for sale from his *cestui que trust*, though for an adequate price, and at no advantage, will be set aside at the option of *cestui que trust*, unless all connexion between them most satisfactorily appears to have been dissolved, and unless all knowledge of the value of the estate

acquired by the trustee was communicated to his *cestui que trust*. (*Fox v. Mackreth*, 1 L. C. Eq. 104.)

A. (a trustee of real estate for B.) purchases the estate from B. soon after he attains twenty-one. Can A. make such a title as a purchaser from him is bound to accept, and if the purchaser does accept the title, does he incur any, and what, liabilities to B.?

A. cannot make such a title as a purchaser from him is bound to accept, as the purchase by him is liable to be avoided by B. for the reasons stated in the last answer. If the purchaser does accept the title, with notice of the trust, he incurs the same liability of having his purchase avoided, and of being compelled to reconvey the estate to B. (*Fox v. Mackreth*, *supra*.)

When an estate is offered to a trustee at a price below its actual value upon condition that the title should not be investigated, is the trustee justified, under the usual indemnity clause inserted in settlements, in purchasing the estate out of the trust-funds at the request of his cestui que trust upon those terms? and give a reason for your answer.

Trustees are not justified in investing trust money in the purchase of real estates, unless specially authorised. If they have power to do so, they cannot, as a general rule, safely buy subject to special conditions, restrictive of a purchaser's right to a marketable title or to the usual evidences of title. If they do so, they will be guilty of a breach of trust. But if a *cestui que*

trust consent to a breach of trust, the trustee will not be charged with the consequences of such breach in respect of the interest of the *cestui que trust*, who so acquiesces therein. (*Brice v. Stokes*, 2 L. C. Eq. 785.)

Can a trustee give a power of attorney to another person to act for him in the trust? and give a reason for your answer.

The office of trustee, being one of personal confidence, cannot be delegated. But the appointment of an attorney, or proxy, to do legal acts, not of a discretionary nature, as, for instance, to execute a deed, is not a delegation of the trust.

TITLE.

Lands may be acquired by descent or by purchase. By what other modes (if any) may land be acquired?

It is said that *all* title is either by *descent* or *purchase*; but, more accurately, it is either by *act of law* or *act of the party*. Of the former, the principal kind is title by *descent*, but it also includes title by *escheat*, *curtesy*, and *dower*, and by *prescription*. Title by act of the party is title by *purchase*, properly so called.

What is the difference between a title by purchase and a title by descent?

Purchase includes every lawful mode of coming to an estate by the act of the party, as opposed to the act of law; for instance, title by forfeiture, and title under a conveyance or will, are each said to be a title

by purchase. Title by *descent* is where, on the death of an owner of an estate of inheritance, without having disposed of it, the estate is cast, by the act of the law, upon his heirs. (As to descent, see *post*.)

A. devises land to B., who is his heir-at-law, does B. take by descent or purchase, and has the law on that subject undergone any, and what, recent alteration?

B. takes by purchase, it being provided by the Inheritance Act, that where a testator, who dies after 31st December, 1833, devises land to his heir, such heir shall be deemed to have acquired the same as devisee, and not by descent. Before this Act he took as *heir*.

What is title by prescription, and what are the different kinds?

Title by prescription arises from a long continued and uninterrupted possession of property. There are two kinds: *negative*, which relates to corporeal hereditaments, and is acquired by uninterrupted possession; and *positive*, which relates to incorporeal hereditaments, and originated from immemorial usage. (As to the latter, see *post*.)

What length of adverse possession will create a good title to lands? And does it make any, and what, difference if the original owner was a minor when the adverse possession commenced?

Twenty years' adverse possession will create a good title to lands, as, by the 3 & 4 Will. 4, c. 27, s. 2, it is enacted, that no action shall be brought to recover

any land but within twenty years next after the time when the right first accrued. But if the owner is a minor, or otherwise under disability, when his right accrues, he and his representatives are allowed ten years from the termination of such disability. But in no case is more than 40 years allowed.

What is the extreme period for which a person can bring an action to recover land or rent?

Twenty years, except in case of disability, but only six years' arrears of rent can be recovered.

Explain the nature of the title by escheat, and when it occurs.

Title by escheat arises where the owner of an estate in fee-simple dies without having disposed of it, and leaves no heir behind him to take it by descent, so that it results back, by a kind of reversion, to the original grantor or lord of the fee. Escheats were formerly divided into those *propter defectum sanguinis*, as where the tenant dies without heirs, and those *propter delictum tenentis*, as where his blood was attainted. But now it is provided by the 33 & 34 Vict. c. 23, that no conviction for treason or felony shall hereafter cause any attainder, or corruption of blood, or any forfeiture or escheat. (Lynch's Stat. Law, 1870.)

If a person who is illegitimate dies intestate, leaving no legitimate issue, who becomes entitled to any freehold or copyhold or personal estate of which he may die possessed?

A bastard is held to be *nullius filius*, and to have no inheritable blood. He can, therefore, have no heirs but those of his own body. Therefore, the freeholds escheat to the lord of the fee, usually the crown, and the copyholds to the Lord of the manor. His personal estate is also forfeited to the crown.

What is title by forfeiture, and when does it arise?

Forfeiture is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, whereby he loses all his interest therein, and they go to the party injured. It may arise, by *alienation in mortmain*, by the *wrongful alienation* of particular tenants, and by *wrongful disclaimer*. It may also arise in other ways, as, for instance, on bankruptcy, which shifts the title of the bankrupt to his trustees for the benefit of his creditors.

What is mortmain?

Mortmain is where any lands are held by any corporation, sole or aggregate, ecclesiastical or temporal. It is so called because purchases in mortmain were chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one "dead hand."

What is the effect of the Statute of Mortmain? And state in general terms what description of property are within it.

The effect of the Mortmain Act (9 Geo. 2, c. 36) is to prevent any disposition by *will* of lands, or money or stock to be laid out in the purchase of lands, in

trust for any charitable use ; and renders void any such disposition (except a *bond fide* conveyance for value), unless made by deed, executed in the presence of two witnesses, twelve calendar months before the death of the donor, and enrolled in the Court within six months after the execution ; or in the case of stock, unless the transfer is made in the bank books six months at least before the donor's death.

What is necessary to the validity of a conveyance of a fee-simple estate in land for the endowment of an almshouse ?

The deed must be executed twelve months before the donor's death, and enrolled as provided by the Mortmain Act, except where the transaction is a *bond fide* purchase for a full and valuable consideration. A license must also be obtained.

Would lands already appropriated to charitable uses require the same formalities if they were conveyed to trustees of another charity ?

No : for the lands are already in mortmain.

A. contracts to sell his fee-simple estate, but dies before the completion of the sale, having made his will, giving the purchase-money to a charity, is the gift good ? Give a reason or authority for your answer.

The gift is void, for the money, being secured by the lien which the testator has for it on the lands contracted to be sold, comes within the Mortmain Act.

What is a disclaimer and its consequences ?

As to disclaimer of *estate*, no person can be compelled to take an estate by *conveyance* against his will. If land, therefore, be conveyed *in invitum*, the effect of the conveyance may be avoided by the execution of a deed of disclaimer on the part of the dissentient alienee.

A disclaimer of *tenure* is a renunciation or a denial by a tenant of his landlord's title, and, if made in a Court of Record, is cause of forfeiture of the lands.

When does a bankrupt's real estate vest in the trustee in bankruptcy?

Immediately upon the order of adjudication being made, the property of the bankrupt vests in the registrar, who is the trustee until a trustee is appointed. On the appointment of a trustee, the property forthwith passes to and vests in him.

What is title by alienation?

This is the most usual title to real estates; under it may be comprised any method wherein estates are voluntarily resigned by one man and accepted by another.

Who is capable of conveying real estate, and who, in the technical sense of the term, of purchasing?

Primâ facie all persons are capable both of conveying and purchasing, unless the law has laid them under any particular disabilities. (1.) *Attainted* persons were formerly disabled; and, by the Act abolishing attainders, it is enacted that a *convict*, that is to say, a person against whom sentence of death or penal

servitude has been lawfully recorded, shall be incapable of alienating his property, which is to vest in an administrator appointed by the Crown. (2.) *Corporations* cannot purchase without a license in mortmain, but they can, as a general rule, alien at pleasure, except where restricted by Act of Parliament, *e.g.*, in the case of ecclesiastical and municipal corporations. (3.) Conveyances by *idiots* and *lunatics* are void, and purchases by them are voidable, if disadvantageous. (4.) Conveyances and purchases by *infants* are voidable. (5.) A purchase by a *married woman* can be avoided by the husband, or by herself after his death; and conveyances by her, except of separate property, must be in the mode specially appointed. (See *post.*) Aliens are no longer under disability. (Lynch's Stat. Law, 1870.)

How must freehold property be conveyed by a corporation?

By deed under their corporate seal.

Can municipal corporations, by their own, or what, authority absolutely dispose of their lands?

They may dispose of their lands, with the approbation of the Lords of the Treasury, or any two of them, and on such terms as they may see fit to approve.

Can an alien hold any real or personal estate in England, and what is the effect of a conveyance to him of an estate in fee?

Before the year 1870, if an alien purchased an estate in lands, the Crown might at any time assert a

right to it, unless it were a lease for not more than twenty-one years. But now, by the Naturalization Act, 1870, it is provided that real and personal estate of every description may be taken, acquired, held, and disposed of by an alien, in the same manner in all respects as by a natural-born subject: and title may be derived through an alien in the same way. (Lynch's Stat. Law, 1870.)

If a man be outlawed in a civil action, is the outlawry any impediment to his making a good title and conveyance to a purchaser of his freehold estate?

No: for only the personal estate is forfeited to the Crown on outlawry. It must be remembered that the law of forfeiture, consequent upon outlawry, is unaffected by the Act abolishing forfeiture for treason and felony. (Lynch Stat. Law, 1870.)

OF THE MODES OF ALIENATION.

By what means are the respective species of property usually conveyed and transferred?

Since the Act to Amend the Law of Real Property, all corporeal hereditaments are conveyed by deed of grant. Incorporeal hereditaments have always been transferred the same way. Leaseholds pass by deed of assignment; and copyholds by surrender and admittance.

Into what two classes may conveyances of land be divided?

(1.) Into *extraordinary* conveyances, or those by matter of record; and

(2.) *Ordinary* conveyances.

What are extraordinary conveyances, or those by matter of record?

Extraordinary conveyances, or those by matter of record, are (1) private Acts of Parliament; and (2) Royal grants.

What are ordinary conveyances?

Conveyances of the ordinary kind are in effect the same as those anciently described as *in pais*; they comprised such as were transacted between two or more persons *in pais*, in the country, *i.e.*, upon the very spot to be transferred. They are divided into conveyances at common law and conveyances by statute law, and are now evidenced by *deed*.

What is a deed, and what are its requisites?

A deed is a writing sealed and delivered. Its requisites are,—(1.) Proper parties and a proper subject matter. (2.) Writing on paper or parchment. (3.) Sufficient and legal words properly disposed. (4.) Reading (if desired) before the execution. (5.) Sealing, and now, in most cases, signing also. (6.) Delivery.

What are the essentials to be attended to on the execution of deeds as well under a power as otherwise?

In the exercise of a power, it is absolutely necessary that the terms of the power, and all the formalities required by it, should be strictly complied with. So far as regards the execution and attestation, however,

if the deed be executed in the presence of, and attested by, two witnesses, it will be a valid execution of the power. (22 & 23 Vict. c. 35.) The essentials of a deed in ordinary cases have been detailed in the last answer. Besides these, it is necessary, for the sake of preserving the evidence of the deed, that it be attested by witnesses. Of these, it is desirable that there should be two, though the deed would not be void without any.

Is it necessary to the validity of a deed that it should in any, and what, cases be read over to the parties?

This is necessary whenever any of the parties desire it. If not done on his request, the deed is void as to him.

Can a deed be altered to any, and what, extent after it has been executed by all or any of the parties?

An alteration in a material part is sufficient to void the deed; but filling in the date of a deed, or the names of the occupiers of the lands conveyed, or any such addition, if consistent with the purposes of the deed, will not render it void.

What is an escrow?

An escrow is a scroll or writing sealed and delivered to a third person to hold till some condition be performed on the part of the grantee. It does not take effect as a deed until such condition is performed.

How may a deed be avoided?

It is void *ab initio* if it want any of the essential

requisites before detailed. It may also be avoided by matter *ex post facts* ; as,—(1.) By alteration in a material part. (2.) By breaking off or defacing the seal. (3.) By delivering it up to be cancelled. (4.) By the disagreement of those whose concurrence is necessary in order for the deed to stand. (5.) And, in some cases, it may be avoided by objections relating to the *consideration* on which it is founded.

What is understood by the term voluntary settlement?

Deeds made without any consideration whatever, and also those made for *good*, though not for *valuable*, consideration, are said to be *voluntary*.

What are the different kinds of consideration to support a voluntary settlement or conveyance?

A *good* consideration, such as that of blood, or of natural love and affection, will support a voluntary deed ; but, in general, a deed will be binding on the party executing it even though there is no consideration at all, and in this case also it is said to be a voluntary deed. (See last answer.)

Is a voluntary settlement good against a purchaser or mortgagee for a valuable consideration with notice of such settlement?

No : the Statute 27 Eliz. c. 4, renders all voluntary settlements void against subsequent purchasers or mortgagees for value, whether with or without notice. A settlement in favour of a charity is so far an exception that, if the purchaser have notice, he is bound by it.

Is a purchaser for a good consideration from a voluntary grantee in a better situation as to title than the voluntary grantee ?

No : the title of a purchaser for a good consideration, in the sense above defined, from a voluntary grantee, is liable to be defeated in the same way.

Under what circumstances does a voluntary conveyance cease to be a flaw in a title ?

When the voluntary grantee conveys to a *bond fide* purchaser for valuable consideration.

So far as a voluntary settlement is voidable under the Statute of Eliz.: state under what circumstances of indebtedness, and in respect of its existing at the time or arising subsequently ; such a settlement is liable to be set aside ; and does the law extend to a settlement of personal as well as real estate ?

Such a settlement is liable to be set aside if the settlor at the time, or immediately afterwards, is indebted to such an amount that he has not ample means, exclusive of the property settled, available to pay his debts. This applies to a settlement of all property, real or personal, liable to payment of debts.

In what case can, and cannot, a settlement of land made after marriage upon a wife and children be set aside ?

Such a settlement, being merely voluntary, is liable to be set aside by purchasers or creditors ; but it is so far an exception to the rule that almost any *bond fide*

consideration, in addition to the meritorious consideration of the provision itself, will be sufficient for the purpose of supporting it. If the settlement be made in pursuance of articles entered into before the marriage, it cannot be set aside, as it is not a voluntary deed, but is in effect the same as if made before and in consideration of the marriage, which is a valuable consideration.

By the Bankruptcy Act, 1869, a voluntary settlement by a trader is void against the trustee in bankruptcy upon his becoming bankrupt within two years; if he becomes bankrupt within ten years it is also void, unless the voluntary grantees can show that the settlor was, at the time thereof, able to pay all his debts without the aid of the property settled.

Define what is meant by the legal term covenant.

A covenant is an agreement of two or more parties, by deed, by which either party stipulates for the truth of certain facts, or binds himself to perform some act, or to give something to the other.

What is meant by the term a covenant running with the land?

A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it, passes to the assignee of the land; such are covenants for quiet enjoyment, for further assurance, and to repair. (*Spencer's Case*, 1 Sm. L. C. 51.)

What are the incidents to make a covenant run with the land?

(1) The covenant must touch and concern the land demised or conveyed. (2) The covenantee must, at the time of the making of the covenant, have the legal estate in the land. (3) The assignee must be in of the same estate in the land which the original covenantee had, for the covenant is incident to that estate. (*Spencer's case, supra.*)

In the case of a purchase of lands by B., the conveyance being made to A. and his heirs, to the ordinary uses to bar dower in favour of B. (the purchaser), with a power of appointment given to B., with which of them should the covenants for title, &c., be entered into, and why?

The covenants for title must be entered into with A. and his heirs, and *not* with B.; the reason is that if B. were made the covenantee, and he were afterwards to exercise his power of appointment in favour of a purchaser, the latter comes in paramount to B., and above the estate of which he was seised, which is defeated by the exercise of the power, as if it had never existed. There is consequently no sameness of estate between B. and the purchaser, and the latter cannot therefore sue on the covenants made with B. (see last answer); but if the covenants are made with A., the grantee to uses, and his heirs, the benefit of the covenants, being annexed to the seisin, is transferred to, and in a manner executed in the various persons who become from time to time entitled, under the uses which that seisin serves. (1 Sm., L. C. 64.)

What do you understand by the doctrine of estoppel? and can it arise under a deed poll?

Estoppel is a conclusive admission which cannot be denied or controverted. It can arise under a deed poll, but the party only who executes it is estopped, since it is his sole language and act.

CONVEYANCES AT COMMON LAW.

What conveyances take effect by the common law?

Conveyances taking effect by the common law are feoffment, grant, lease, exchange, and partition, which are primary or original conveyances; and release, confirmation, surrender, assignment, and defeasance, which are of a secondary or derivative sort, and presuppose some other conveyance precedent.

State the common form of assurance before the Statute of Uses.

Before this statute, a feoffment with livery of seisin was the common form of assurance.

What is a feoffment? and is there anything, and if so what, essential to perfect it?

A feoffment is a method of alienation for conveying an estate of freehold in possession in a corporeal hereditament. To perfect it, there must be a delivery of the corporeal possession of the tenement, called livery of seisin.

What are the different kinds of livery of seisin?

They are of two kinds, livery in deed and livery in law.

Is there any custom which enables an infant to convey by any and what form of assurance?

By the custom of gavelkind, the tenant can dispose of his estate by feoffment at the age of fifteen years.

What is the consequence of the omission of the indorsement of the livery of seisin on a feoffment? and will the omission of this indorsement be cured by lapse of time?

The consequence may be that the feoffee may be unable to prove that livery of seisin was actually given. It may be proved, however, by parol evidence, and where the possession has been enjoyed for twenty years under the feoffment, livery of seisin will be presumed to have been given, though no memorandum thereof is endorsed; and equity will supply the want of it where the deed was for a valuable consideration.

Why is a feoffment no longer a necessary form of assurance?

Because now, by the Act to amend the Law of Real Property (8 & 9 Vict. c. 106), it is enacted that all corporeal hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant, as well as in livery. A deed of grant, therefore, is all that is required. For some time before this Act a lease and release were generally employed, in order to avoid the necessity of that for-

mal delivery of possession which was always required on a feoffment.

An Act of 1845 enacts that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be held to lie in grant as well as in livery. State the meaning and effect of this enactment.

The effect of this statute is, that a deed of grant is alone sufficient for the conveyance of all corporeal hereditaments: before this Act, they were said to lie in livery only.

In what case prior to 8 & 9 Vict. c. 106 (an Act to Amend the Law of Real Property), was a feoffment a necessary form of conveyance?

In no case was it absolutely necessary, for although before that Act corporeal hereditaments were properly said to lie in livery, they could always be conveyed by conveyances operating under the Statute of Uses, and this was generally done, a lease and release being the form adopted.

Does the word grant in a conveyance imply in all cases, or in any, and what, cases a warranty of title?

By the Act to Amend the Law of Real Property it is provided that the word "grant" in a deed shall not imply any covenant in law except where it is made to imply a covenant by any Act of Parliament. By the Registry Acts for Yorkshire, the words "grant, bargain, and sell," in a deed of bargain and sale of an estate in fee-simple, enrolled in the registry office,

imply covenants for quiet enjoyments and further assurance; and, by virtue of some other Acts, the word "grant" implies covenants for title in conveyances by companies, under the Lands Clauses Consolidation Act, 1845, and by companies registered under the Joint-Stock Companies Act, 1856, and in conveyances to the Governors of Queen Anne's Bounty.

On an exchange of land, what would be the consequence of ouster of one of the parties from defect of title?

Formerly, on an exchange, if either party were evicted of the lands taken by him in exchange, he could return back to the possession of his own, by virtue of an implied warranty; now, by the Act to Amend the Law of Real Property, no such condition is to be implied on an exchange.

What are the objections to a deed of exchange as a mode of conveyance?

The objection was, that a warranty of title was implied, which gave to either party a right of re-entry on eviction. But this is no longer so. (See last answer.)

What is a deed of partition, and by whom made?

A deed of partition is a mutual conveyance between two or more joint tenants in common, whereby they agree to divide the lands so held among them in severalty, each taking a distinct part.

What is a defeasance?

A collateral deed, made at the same time with a

feoffment or other conveyance, and containing certain conditions, on the performance of which the estate then created may be defeated or totally undone.

CONVEYANCES UNDER THE STATUTE OF USES AND
HEREIN OF POWERS.

What conveyances take effect by force of the Statute of Uses?

They are the following:—Covenant to stand seised, bargain and sale, lease and release, and feoffment to uses, now superseded by a grant to uses. An appointment under a power, though operating by force of the statute, is not an independent conveyance.

What is a covenant to stand seised?

A covenant to stand seised is a conveyance adapted to the case where a person seised in fee of land in possession, vested remainder or reversion, purposes to convey his estate to his wife, child, or kinsman. In its terms, it consists of a covenant by the alienor to stand seised to the use of the intended party. Before the Statute of Uses, this would merely have raised a use in favour of such party, but now the legal estate will be transferred to him.

A. contracts to hold Blackacre to the use of B. to the use of C. What is the effect of such a limitation, and what are the respective interests of B. and C. resulting therefrom?

B. will have the legal estate and C. the equitable, for such a contract, if made for a *good* consideration, amounts to a covenant to stand seised, or if for a *valuable* consideration to a bargain and sale; but in each case the contract must be by *deed*, and in the latter duly enrolled under 27 Henry 8, c. 16. If the contract were merely in writing, the legal estate would not pass, but the seisin would remain in "A," who would hold in trust for C., and B. would take nothing.

What is the nature of a bargain and sale, and what is necessary to perfect it?

It is a conveyance operating under the Statute of Uses. In its terms it consists of a bargain and sale for money by the alienor to the intended alienee; by this contract, the former becomes seised to the use of the latter, and the Statute of Uses executes that use, and clothes the alienee with the legal estate. At the common law, it might be by parol merely, but by the Statute of Enrolments, 27 Henry 8, c. 16, it must be by deed indented and enrolled.

What is a lease and release?

A lease and release is a conveyance of a compound description, consisting of two separate parts: first, a bargain and sale of some leasehold interest, usually for the term of one year, by which the legal estate for a year is passed to the bargaineer without entry by force of the Statute of Uses; and, secondly, a common law conveyance of release, by which the freehold and re-

version is released to the transferee. By this means the freehold was passed to the alienee without livery of seisin, entry, or enrolment, as the Statute of Enrolments extends to bargains and sales of freeholds only.

Give a concise description of a springing use, and show how it may be created.

A *springing use* is a use limited *in futuro*, independently of any preceding estate. As if an estate is granted to A. and his heirs to the use of B. and his heirs at the death of C. Here, during C.'s life, a use results to the grantor ; but, on his death, the springing use is executed, and B. is clothed with the legal estate in fee. Such a use is also called *executory*, as it is not executed by the statute until it comes into *esse* by the arrival of the period contemplated. A springing use may be created by a conveyance operating under the Statute of Uses, or by will.

What is a shifting use? and give an instance.

A *shifting*, or *secondary use*, is a use limited *in futuro* to one person, in abridgment or defeasance of a preceding estate, limited to another, as when lands are granted to A. and his heirs to the use of B. and his heirs, with a proviso that on a certain event the lands shall be to the use of C. and his heirs. This is also of the *executory* kind, the operation of the statute being suspended till the event arrives.

Give an instance of an executory use, and by what instruments may land be limited to executory uses?

As before explained, both springing and shifting

uses are of the executory kind ; for instances, see the two preceding answers. Executory uses may be created by deed under the Statute of Uses, or by will.

How is a condition for taking the names and arms of a settlor enforced ?

By way of shifting use, by means of which, if the party for the time being refuse or neglect within a definite time to assume the name and arms of the settlor, the lands will shift away from him, and vest in the person next entitled.

Are shifting uses subject to the restraints against perpetuities, and are they destructible ? and, if so, by what means ?

Shifting uses are subject to the restraints against perpetuities. In their nature they are indestructible ; but if subsequent to, or in defeasance of an estate tail, they may be barred by the same means as remainders expectant on the determination of an estate tail.

What are powers ? and how may they be divided ?

A power is an authority given to a person to revoke, alter, or modify the uses of an estate already limited by means of a declaration or appointment operating under the Statute of Uses. They may be divided into (1) those simply collateral, i.e., where the donee of the power has not, nor ever had, any estate in the land ; and (2) those not simply collateral, which are either powers *appendant* or powers *in gross*. (*Edwards v. Slater*, L. C. Conv. 305.)

What is a power appendant ?

A power *appendant*, or annexed to the estate, is where the donee of the power has an interest in the estate to which it is annexed, and the use or estate to be created by the power will take effect out of such interest; as where a tenant for life has power to grant leases. (*Edwards v. Slater, supra.*)

What are powers in gross?

Powers in gross are those which are given to a person who had an interest in the estate at the time of the execution of the deed creating the power, or to whom an estate is given by the deed as well as the power, but which enables him to create such estates only as will not attach on the interest limited to him, as in the case of a power given to a tenant for life to make a jointure which will take effect after his death. (*Edwards v. Slater, supra.*)

How does an appointment under a power in a conveyance or settlement affect the estate and the conveyance or settlement of it?

The effect of the appointment is to defeat the uses of the estate already limited, and to raise in favour of the appointee a use corresponding to the estate appointed, which, being served out of the original seisin, is immediately executed by the statute, and transmitted into an equivalent legal estate.

Where a power of appointment over real estate is executed, from whom does the appointee immediately take in point of estate, viz., the party creating the power or the party executing it? and state the reason.

From the party creating the power; for the appointment is not an independent conveyance, but merely a limitation of the use; and the appointee derives his title under the original conveyance, and is in the same position as if the instrument had actually contained a limitation in his favour to the extent of the estate appointed.

A., under a power, appoints a fee-simple estate to B. and his heirs to the use of C. and his heirs, what estates legal and equitable do B. and C. respectively take?

The power of disposition exercised by A. extends only to the use of the land; therefore, if he appoint to B. and his heirs, B. has the legal estate by virtue of the Statute of Uses, and the use to C. and his heirs, being a use upon a use, is not executed; and he, therefore, only has an equitable estate in fee-simple.

A fee-simple estate is conveyed to such uses as A. shall appoint. A., in execution of his power, appoints to B. and his heirs to the use of C. and his heirs in trust for D. and his heirs. In whom is the legal estate?

B. has the legal estate, for the reasons stated in the last answer, and holds in trust for D. and his heirs. C. takes nothing.

If A. (seised to uses to bar dower) appoints the fee to B. to the use of C., D., and E., would the estates of C., D., and E. be legal or equitable?

The estates of C., D., and E. would be equitable, for the reasons before stated.

A fee-simple estate is conveyed to C. to such uses as

A. should appoint. A. sells to B., and exercises the power by conveying the estate to C. (a trustee for B.) and his heirs to the use of B. and his heirs, in whom does the legal estate vest?

The legal estate is vested in C., for the reasons before stated.

Lands stand limited to such uses as A. shall by deed appoint, and in default of appointment to the use of A. in fee, A. in pursuance of his power appoints, and by way of further assurance conveys to B. and C. and their heirs to uses. Are the uses executed by the Statute of Uses, or do they take effect in equity only?

If, at the time of the execution of the deed, the power is valid and subsisting, the subsequent conveyance to B. and C., and their heirs, is of course inoperative, and the uses will not be executed by the statute. But if the power by any means have been suspended or extinguished, then the conveyance takes effect, and the uses will be transferred into possession.

When a power is executed by will, at what point of time does it take effect? and would there be any difference in this respect if the power were executed by deed with a power of revocation to the appointor?

In the case of the will, the appointment thereunder takes effect from the death of the testator. In the case of the deed from the date of the instrument; though, if a power of revocation be reserved, the ap-

pointment thereunder is liable to be defeated at any time during the life of the donee of the power.

State in general terms the rule for determining how far a power is suspended or extinguished by any act of the donee of the power, having also an interest in the estate, affecting that interest. Could such donee after creating a charge on his estate exercise a power in any way defeating such charge?

In this case the power is a power appendant, as the donee has an interest in the estate; and the use to be created by the power is to take effect out of such interest. Such a power will be *suspended* by alienation by the donee of part of his interest, or entirely *extinguished* by an alienation of the whole of such interest. After creating a charge, therefore, on his estate, he could not in any way defeat it by exercising the power. (*Edwards v. Slater, supra.*)

If a tenant for life, with power of leasing, were to alienate his whole life-interest, would that power be extinguished? Would a power in gross be extinguished by alienation of that interest?

If a tenant for life, with power of leasing, alienate his whole life interest, his power, being a power appendant, would be wholly extinguished (see last answer); but a power in gross would not be extinguished by such alienation, for, as the donee of the power can only alienate his own interest, and the appointment under the power is not to take effect until after the termination thereof, he does not, by an execution of

the power, in any way derogate from his own grant. (*Edwards v. Slater, supra.*)

A tenant for life, with power of leasing, mortgages his estate, how far is he thereby restrained from exercising his power? May, or may not, stipulations be made in the mortgage deed for the exercise of such power, and what would in ordinary cases be proper?

He is only restrained from exercising his power in any way that may be to the prejudice of the mortgagee. Stipulations may be made in the mortgage deed for the exercise of the power, with the consent of the mortgagee, or in such manner as may be agreed on; and, in ordinary cases, such stipulations would be advisable and proper.

Trustees under a settlement of real estate have a power of sale with the consent of the tenant for life. The tenant for life encumbers his life estate, can he afterwards consent to a sale?

Yes; the power of consent will still remain in him, notwithstanding he has mortgaged his life estate. (See notes to *Edwards v. Slater, supra.*)

If an estate is limited to A. for life, with power to grant leases for 21 years, and A. conveys all his estate, right, and interest to B., can B. execute the power?

If the power were expressly given to A. and his assigns, B. can exercise the power, for such a power, being annexed to an interest in the donee, will pass with it to any person who comes to the estate under him.

What is the effect of a lease of two farms at an entire rent, one of which belongs to the lessor in fee and the other is subject to his power of leasing ?

If the rent were sufficient in amount for the two farms, the power would be well executed ; and, upon the death of the lessor, the rent would be apportioned, and go according to his several interests in the farm.

What is the effect of bankruptcy on a general power to appoint real estate ?

The power will become vested in the trustee under the bankruptcy; for it is provided by the Bankruptcy Act, 1869, that the trustee under the bankruptcy may exercise, for the benefit of the creditors, all powers (except the right of nomination to a vacant ecclesiastical benefice) which might have been exercised by the bankrupt for his own benefit.

Where a will contains a power to raise money out of an estate not confined to raising it out of the rents, or a power to charge the estate generally, would such power authorise a sale or mortgage of the estate, or both ?

Yes ; the Court will in such a case so construe those words as to give a power to raise by sale or mortgage, unless restrained by other words.

By the Act called the Trustees and Mortgagees Act, passed 28th August, 1860, in all cases where by deed, will, or other instrument of settlement, executed after the passing of the Act, a power of sale is given, there

being given by the Act authority to exercise such power of sale, in the way, under the restrictions, and with the powers therein mentioned. Describe in a general way the powers and authorities given by the Act.

When under any such instrument trustees or other persons have a general power of sale, they may sell, either together or in lots, and either by public auction or private contract, at one or several times, and under special conditions, and may buy in, and rescind or vary any contract for sale, and resell, without being responsible for loss; and they are to have full power to convey to the purchasers. (Ss. 1, 2, 3.)

May minerals, with right to work them, be excepted by trustees of a settlement out of a conveyance of land in fee, and remain distinct property? What amendment of the law on this point as to certain sales or dispositions has been made by a recent statute?

A trustee or other person authorised to dispose of land by way of sale, or exchange, partition, or enfranchisement, may, with the sanction of the Court to be obtained in a summary way, dispose of the land without the minerals, or of the minerals without the land, unless expressly forbidden by the instrument creating the trust or power, and all such sales made before the Act are expressly confirmed. (25 & 26 Vict. c. 108.) Before this it was held that they could not do so under the ordinary power of sale and exchange.

May a deed or will, executed by virtue of a power requiring attestation by three witnesses, be executed

only in the presence of two? If so, name the statutes respectively authorising such attestation.

By the Wills Act (1 Vict. c. 26), it is provided that every will executed in the manner required by the Act shall be a valid execution of a power of appointment by will, notwithstanding some additional solemnity is required, and by the 22 & 23 Vict. c. 35, it is enacted that a deed executed in the presence of, and attested by, two witnesses, shall be a valid execution of a power of appointment by deed.

Before the Wills Act, was there any exception to the rule that required a strict adherence to the prescribed formalities?

Before this Act every execution of a power to appoint by will was obliged to be effected by a will conformed in the number of its witnesses, and other circumstances of its execution, to the requirements of the power.

If a person having simply a power of appointment over land and no estate executes a deed purporting to convey the land as if he were seised of the estate, would the conveyance vest the property in the grantee?

Yes, if the deed was executed with the required formalities, for it is not absolutely necessary to refer to the power.

When under a settlement or will a father has a power to appoint among all his children as he may think fit, will an appointment which leaves out one or more of such children be effectual, or is it necessary he

should appoint a share to each, and, if so, must such share be a substantial, or may it be a merely nominal one?

A father who has the power of appointing among all his children cannot leave out one or more of such children; for, where an exclusive appointment is not authorised, any appointment by which any object of the power would be entirely excluded is void. Formerly it was necessary also that a *substantial* share should be appointed to each child in such a case, but it is now provided that the appointment of a share, however small, shall be valid, and shall not be set aside on the ground of its being illusory. (1 Will. 4, c. 46.)

A. by his will gives B. a power to appoint a sum of money to all, or some, or one of his (B.'s) children as B. may think fit. B. has several children; one of such children dies in B.'s lifetime, leaving children, being B.'s grandchildren. Is B. authorised under such power to appoint any part of the money to such his grandchildren or any of them?

No, he is not; for a grandchild is not an object of the power. (*Alexander v. Alexander*, L. C. Conv. 330.)

Suppose an estate being settled upon A. for life, with remainder to such son of his as he should appoint, and A. should appoint to his son B., who has just attained twenty-one, and A. and B. should thereupon mortgage the estate to a third person for money advanced to A., would such a transaction be valid? State the reason for your answer.

A person having a power must exercise it *bonâ fide* for the end designed, otherwise it is corrupt and void. Accordingly, any exercise of the power under a bargain for, or even with a view to, the benefit of the appointee, or of any person not an object of the power, is considered a fraud on the power, and is void. In the case stated above the transaction would be liable to be set aside if it can be shown that the mortgagee had notice of the fraud. (*Aleyn v. Belchier*, 1 L. C. Eq. 339.)

In case a father has a power of appointing a sum of money among his children, and, in consideration of a sum paid to him by one of such children, he makes an appointment in favour of such child, is the appointment good? and give a reason for your answer.

This is clearly a fraud on the power, and void, for the reasons stated in the last answer.

State in a general way the origin, whether by common law or decision, of the rule for prevention of remoteness under the name of the rule against perpetuities, and give in definite terms that rule, stating within what period, reckoning from what time, executory interests, other than those in remainder after an estate tail, must vest in right, if at all.

The rule against perpetuities has been established by a series of judicial decisions, and is derived from the state of the law with respect to entails; even upon the most permanent plan, that of strict settlement, the estate in tail could not, after *Taltaram's*

case, be preserved from alienation longer than during the life of the taker of the first estate of freehold, and the non-age of the tenant in tail in remainder. By analogy to this it has become the rule that an executory interest must vest within the period of any fixed number of existing lives, and an additional term of 21 years, allowing further for the period of gestation, should gestation actually exist.

To what extent can real property be settled without violating the rule against perpetuities?

During the existence of a life or lives in being, and 21 years after. (*Cadell v. Palmer*, L. C. Conv. 321).

Does the law of perpetuities prohibit the breaking up of an estate in fee-simple into several estates in fee-tail, to take effect one after another, and, if not, why not?

No, it does not. As the rule against perpetuities does not apply to remainders after an estate tail, for the liability of that to be barred is a sufficient protection from perpetuity.

State fully the four periods during which the accumulation of the profits of real or personal property can be made, and give the exceptions.

The four periods are (1) during the life of the grantor; or (2) 21 years from the death of the grantor or testator; or (3) during the minority of any person living or in *ventre sa mère* at the death of such grantor or testator; or (4) during the minority only of

any person who, under the instrument directing such accumulation, would, for the time being, if of full age, be entitled to the income so directed to be accumulated. (39 & 40 Geo. 3, c. 98.) But the Act does not extend to any provision for payment of debts or raising portions for children, or touching the produce of timber or wood.

If the trust as created should exceed the period beyond which the accumulation of the income of trust property is by law prohibited, will it fail altogether, or how otherwise?

It will be good for the twenty-one years allowed by the Act, but if it exceeds the time allowed by the rule against perpetuities it will be void altogether. (*Griffiths v. Vere*, L. C. Conv. 430.)

In case of a will coming within the new Wills Act, and containing a residuary devise, how will void accumulations directed to be made out of real estate pass?

They will go to the residuary devisee.

What is the difference, as regards the rule against perpetuities, between a general and special power?

In the case of a *general* power the property is evidently not tied up so long as such a power exists over it, and neither the reason nor the rule which forbids a perpetuity has any application till some settlement is made in exercise of such power; the limits of perpetuity therefore commence from the time of the appointment. But in the case of a *special* power, when

it is to be exercised only in favour of a particular class of objects, the property subject to the power is evidently already tied up in favour of that class. The limits of perpetuity, therefore, are to be reckoned from the date of the instrument creating the power ; and if any interests given by the power would have been too remote if inserted in the original settlement, they will be too remote when given in exercise of the power.

If in a strict settlement a power of sale and exchange be given, not expressly limited in its duration, is it valid, and if so, during what period and state of circumstances will it continue ?

It has been decided that such a power is not void in consequence of its exercise not being in terms limited by the settlement to the period allowed by law for the vesting of a shifting use. When the entail is barred or comes to an end the power is destroyed.

CONVEYANCES BY TENANTS IN TAIL AND MARRIED WOMEN.

Explain the nature and objects of fines and recoveries, and what was substituted in their place by the Act of Parliament abolishing the same.

In their nature and origin both fines and recoveries consisted of fictitious suits in the Court of Common Pleas at Westminster, brought for the recovery of the possession of land, in which the intended alienee was supposed to recover the estate by process of law. Their

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object was to confer a title on the alienee in those cases where an ordinary conveyance would not suffice, as in the case of conveyances by married women and tenants in tail. *Fines* were the most ancient, and were so called because they put an end to the suit then commenced, it being compromised, and also to all other suits and controversies concerning the same matter. *Common Recoveries* were introduced to elude the Statute *de Donis*, and differed from a fine by being carried on through every regular stage of proceeding. A fine levied by a tenant in tail barred the issue only of the tenant; a common recovery barred also all remainders and reversions, and all executory limitations over.

As to the more simple modes substituted by the Act, see *post*.

State the date and title of the Act of Parliament under which an estate tail can now be barred, and its principal enactments.

The 3 & 4 Will. 4, c. 74, passed in the year 1833, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more Simple Modes of Assurance." It first enacts that after 31st December, 1833, no fine shall be levied or recovery suffered of lands of any tenure, and then provides new methods for barring estates tail, establishes the office of protector of the settlement, and enables tenants in tail to grant leases, as before mentioned. It also contains provisions enabling a married woman to dispose, by

the means therein specified, and with her husband's concurrence, of any estate which she alone or he in her right may have, as fully and effectually as if she were a *feme sole*.

How may an entail be barred at this day.—1. *By tenants in tail in possession?* 2. *By tenant in tail in remainder?*

By the Fines and Recoveries Act every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, can dispose of the lands entailed for an estate in fee-simple absolute by any mode of assurance, provided that it be by an actual conveyance, and not one vesting in contract only, and that it be by deed, and enrolled within six calendar months after the execution. If the estate tail be in remainder, and there be a "protector of the settlement," his consent must be given by the same deed, or one enrolled at the same time, in order to render the bar effectual against those in remainder or reversion.

Suppose a tenant in tail conveys the fee-simple of an estate by lease and release to a purchaser, what estate does the purchaser acquire?

Any form of conveyance, provided it be by deed executed by the tenant in tail and duly enrolled, and provided the protector (if any) consent, is sufficient to pass the fee-simple to the purchaser. •

If, under the Act of 1833, for the abolition of fines and recoveries, a tenant in tail makes a valid conveyance to a purchaser and his heirs, is the purchaser's

estate necessarily a fee-simple absolute, or what else may it be under any, and, if any, what circumstances?

Not necessarily; as if the estate tail be in remainder, and there be a protector who does not consent, the purchaser will take only a base fee.

Before 3 & 4 Will. 4, c. 74, whose concurrence was necessary to enable a tenant in tail in remainder expectant on an estate of freehold to bar the entail, and whose concurrence is now necessary?

Before the Act the concurrence of the person in whom the immediate freehold was vested. Since the Act the concurrence of the "protector of the settlement" is necessary.

Who is the "protector of the settlement?" Can a tenant in tail in remainder bar his estate tail without the protector's consent? and, if so, what are the nature and liabilities of the estate which he can create?

The "protector of the settlement" is generally the owner of the first estate of freehold (or for years determinable on a life or lives) prior to the estate tail, provided such prior estate be created *by the same settlement*. But the settlor may by the settlement appoint any number of persons, not exceeding three, to be together protector.

A tenant in tail in remainder may by an assurance, without the protector's consent, bar his own estate tail, but not the rights of those claiming in expectancy; such an assurance will therefore convey no more than a base fee determinable on the failure of issue.

Land is by deed limited to the use of A. for life, with remainder to B. in fee. B. dies, having by another instrument, namely, his will, devised the land (subject to A.'s life estate) to C. in tail, with remainder over. A. is still living, C. is desirous of barring his estate tail. State whether there is any protector of the settlement whose consent is necessary in order to enable C. to bar the estate tail.

Here the prior estate is constituted by a different assurance to the estate tail ; there is therefore no protector. (See last answer.)

A. is tenant for life, B. is tenant in tail in remainder under the settlement ; A. sells his life interest to C. Who are the necessary parties to the instrument by which B. may acquire an estate in fee-simple in remainder ?

The office of protector is a *personal* one, and therefore A. does not lose his right to act in that capacity by a transfer of his life estate. Consequently A., and not C., must join with B. in barring the entail.

In case the person who would otherwise be protector is a lunatic, idiot, or of unsound mind, who is then the protector ?

When the person who would otherwise be protector is incompetent by reason of insanity, the Lord Chancellor or other the person or persons for the time being entrusted by the King's or Queen's sign manual with the care and commitment of the custody of the persons and estates of lunatics or idiots, is to be the protector of the settlement in his stead.

Where a married woman is protector of the settlement, how is her consent given in order to bar the entail?

If the prior estate in respect of which she is protector is settled to her separate use, she is to hold the office independently of her husband; but where not so settled, she and her husband together are to be the protector, and to be deemed one owner. But in each case she may give her consent in the same manner as if she were a *feme sole*, and the deed need not be acknowledged by her.

What estate can a tenant in tail in remainder create by any assurances executed—(1) with, or (2) without, the consent of the tenant for life in possession?

(1) An estate in fee-simple.

(2) A base fee.

Land is devised to a son A. for life, and, after his death, to a daughter B. for her life, and after the decease of both, to the heirs of the body of A. A. has an only son, who is, of course, heir apparent, and also daughters; he wishes the estate to go to his daughters, and not to his son. Can he by any, and what, means effect this without the consent of his son?

Here, by the rule in Shelley's case, the limitation to the heirs of the body of A. following the gift to him for life, confers on him an estate tail, and is not to be understood as conferring any distinct estate on the persons who may be his representatives. A. can, therefore, without the consent of his son, bar the

entail, and then devise the fee-simple to his daughters, or settle it as he pleases.

Estates are settled upon A. for life, remainder to B. for life, remainder to the heirs of the body of B., remainder over. Can B., by any, and what, means bar the entail during the life of A. ?

Here, again, B. (by the same rule) is tenant in tail in remainder, expectant on the life estate of A., who is protector of the settlement. B. can, therefore, with A.'s consent, bar the entail.

A. and B. are man and wife, but have no child ; land is limited to A. and the heirs of his body by B. During the life of B., or after her death, can A. by any, and what, means acquire an estate in fee-simple in the land ?

During the life of B., A. being tenant in special tail may, by deed enrolled under the Fines and Recoveries Act, bar the entail and acquire the fee-simple in the land ; but after the death of B. he is only tenant in tail after possibility of issue extinct, and cannot therefore bar the entail.

Prior to the 3 & 4 Will. 4, c. 74, if a tenant in tail, with the immediate remainder or reversion in fee to himself, levied a fine, he created what was called a base fee, which immediately merged in the reversion, and became subject to any charges affecting the latter, the title to which he was also in future obliged to show. What difference in this respect has been made by the above statute, both as respects past and future cases ?

By this Act it is declared that in such a case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as the tenant in tail, with the consent of the protector (if any), might have created if the remainder or reversion had been in any other person. (S. 39.) The effect of this is that, instead of the base fee being destroyed and the reversion in fee becoming an estate in possession, as was the case before the Act when the tenant in tail levied a fine, the reversion in fee is destroyed, together with all charges affecting it, and the base fee is converted into a fee-simple absolute, in the same way as when before the Act the tenant in tail suffered a common recovery.

If a tenant in fee-simple contracts to make a conveyance and dies before it is made, equity will enforce the contract against his heir; is there a like equity as to the contract of a tenant in tail? Give a reason for your answer.

No; for it is expressly enacted by the Fines and Recoveries Act that no disposition by a tenant in tail resting only in contract either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity. (S. 40.)

Is any reference to the statute necessary in a disentailing assurance? and what is the effect of omitting the enrolment of the deed within the specified time?

No reference to the statute is necessary in a disen-

tailing deed. If not enrolled in time, it will have no effect under the Act.

Where money is settled upon trust to be invested in real estate, and to which A. (a married woman) is entitled for life, and B. (tenant in tail) is entitled in remainder, in what way should a transfer of their interests be effected?

In such a case, the provisions of the Fines and Recoveries Act apply to the money so to be invested, in the same way as they would apply to the lands to be purchased, supposing the same to be actually purchased and settled. A., therefore, would be considered as protector, and B. as tenant in tail in remainder. But the money is still regarded as personal estate, and the form of assurance will be, not by a conveyance appropriate to realty, but by a mere deed of assignment executed by A. and B., and enrolled within six months after execution. A.'s husband must also concur, unless her life interest is for her separate use.

Money is directed to be laid out in the purchase of lands to be settled, and of which A. would be tenant in tail. A. prefers having the money instead of its being laid out. Can he by any, and what, means avoid such investment, and obtain the money to be paid to him at his own disposal?

Yes; by executing a deed of assignment by way of disentailing assurance. (See last answer.)

How did a married woman pass her interest in

freehold estate before the Fines and Recoveries Act? and how since?

Before this Act, by fine or recovery levied or suffered by the husband and wife, in which the wife was examined apart from her husband as to her freedom and consent.

Since that Act she may dispose thereof by deed, in which her husband must concur, and which must be acknowledged by her before a Judge of the Supreme Court, or before two Commissioners, or a Judge of the County Court, and they must before they receive the acknowledgment examine her apart from her husband, to ascertain her free and voluntary consent. An official memorandum of the fact is endorsed on the deed, and a certificate thereof, on parchment, signed and verified by affidavit, is filed of record in the Court.

State in detail the three interests which married women may pass by a deed acknowledged before a judge or commissioners.

- (1) Under the Fines and Recoveries Act a married woman may by this means dispose of any land, and money to be invested in the purchase of land, and dispose of, release, surrender, or extinguish any estate or interest in, or power over, the same. (S. 77.)
- (2) Under 8 & 9 Vict. c. 106, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in lands of any tenure may be disposed of, and any estate or interest in lands of any

tenure disclaimed, by a married woman in the same way. (Ss. 6 & 7.) (3) And under 20 & 21 Vict. c. 57, a future or reversionary interest, vested or contingent, in personal estate may be disposed of, and any power over the same may be released by her. (See *post.*)

Can a married woman by any, and what, means sever a joint tenancy of real estate?

Yes; by deed acknowledged in the way before explained, for the Stat. 3 & 4 Will. 4, c. 74, empowers her to dispose of and extinguish any estate which she (or she and her husband in her right) may have in lands of any tenure.

Does the Statute 3 & 4 Will. 4, c. 74, apply to the equitable, as well as to the legal, estate of a married woman, or to leaseholders for years?

It applies to both legal and equitable estates. The husband becomes by the marriage possessed of the wife's leaseholds in her right, and can dispose of them as he pleases by any act during the coverture. (See *post.*)

WILLS OF REAL AND PERSONAL ESTATE.

What is a will?

A will is the legal declaration of a man's intentions, which he wills to be performed after his death.

Who may make a will, and what persons are incapable of making a will?

By the Wills Act it is enacted that any person may dispose of his real and personal estate by will, except infants and married women. But, at common law, idiots, lunatics (except during lucid intervals), persons imbecile from disease, old age, or drunkenness, are incapable of making a will. Traitors and felons also, from the time of their conviction (except as to trust property). And outlaws are incapable of making a will of personal property, while the outlawry continues.

At what age may a will of real or personal estate be made?

Since the Wills Act, no person under the age of 21 years can make a will; before this Act, infants might make a will of personal estate, at the age of 18.

When, and of what property, may a married woman make a will?

By the Wills Act, no will by a married woman shall be valid, except such as might have been made by her before the Act. As a general rule, she is incapable of making a will without her husband's consent, and this consent may be revoked at any time before the probate. She may, however, (1) devise her copyholds under a special custom; (2) make a will in pursuance of an ante-nuptial agreement, or of a post-nuptial agreement for consideration; (3) or by virtue of a power; (4) or of property, real or personal, to which she is entitled for her separate use; (5) when she is executrix, she can make a will for the purpose of de-

volving her representative character ; (6) if she have obtained a protection order, or is judicially separated, or if her husband has abjured the realm, or been banished, the wife's disability ceases both as to real and personal estate.

State the mode in which a will is required to be executed by the Act 7 Will. 4, & 1 Vict. c. 26, for the amendment of the law relating to wills : and has any further alteration been made ?

The 1 Vict. c. 26, enacts that the will must be signed at the foot or end thereof by the testator, or by some person in his presence, and by his direction ; and the signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time ; and such witnesses must attest and subscribe the will in the presence of the testator. And, as to the *position* of the signature, it is, by 15 & 16 Vict. c. 24, made sufficient if it is so placed that it is apparent on the face of the will that the testator intended to give effect by such signature to the writing signed as his will. But the signature is not sufficient to give effect to any disposition underneath, or following it, or inserted after it was made.

Previously to January, 1838, how many witnesses were required to a will of real estate, and how many to a will of personal estate ? and what is the present law in regard to each ?

The Statute of Frauds required three witnesses at

least to a will of real estate, but none were necessary in the case of a bequest of personal estate. Now, by the Wills Act, two witnesses are necessary in each case.

Who ought not to be an attesting witness to the execution of a will ?

Any person to whom, or to whose wife or husband, any beneficial gift or appointment is made by the will. For, although the evidence of such a witness is admissible to prove the will, the gift to him or her, or to his or her wife or husband, will be void.

What is the effect of a legacy to a child of an attesting witness ?

The legacy is good, as the Wills Act only declares that a gift to the husband or wife of an attesting witness shall be void.

Is there any, and what, valid objection to an executor or creditor being an attesting witness to the execution of a will ?

No ; for it is expressly provided that no person shall be incompetent as a witness on account of his being executor, and that a creditor may be a witness even though there is a charge for payment of debts.

Is it requisite that the testator see the witnesses attest the will ?

It is not necessary that he should actually see the signing ; it is only requisite for it to be done within his view, so that he might see it if he look.

What are the proper solemnities to be observed on the execution of a will by a testator who is blind ?

The will should be read over to him, though this is not absolutely necessary; for, in proportion as the infirmities of a testator expose him to deception, it should be the care of all persons assisting in the transaction to be prepared with the clearest proof that no imposition was practised. The witnesses must sign in such a position that the testator, if he had his eyesight, might have seen them.

Must all the witnesses sign their names in the presence of each other?

This is not required by the Wills Act, only that the testator should sign in the presence of both at the same time, and that each witness should sign in the testator's presence. But neither of the witnesses should leave the room before signing.

Is a will unattested under any circumstances valid?

Yes. Wills of personal estate made by soldiers in actual military service, and seamen at sea, need not be in writing, or attested. Except in the case of petty officers, and seamen in the royal navy, and of marines, and non-commissioned officers of marines, and of merchant seamen, so far as relates to any pay or prize money.

If alterations are made in a will previous to the signing, what precautions would you use with respect to them?

The testator and witnesses should sign in the margin, or in some other part of the will opposite or near to such alteration, or at the foot, or end of, or opposite

to a memorandum referring to such alteration. (1 Vict. c. 26, s. 21.)

What is necessary if the testator makes an alteration after signing?

The will must be re-executed; such alteration being signed in the way described in the last answer.

How can the revocation of a will be now effected?

There are four modes in which a will may be revoked: (1) by another will, or writing, executed in the same way as the original will; (2) by burning, or other act done *animo revocandi*; (3) by the disposition of the property by the testator in his lifetime; (4) by marriage. By the first and third of these modes the will may be revoked either entirely or partially; by the second and last the revocation will be total.

State the effect of a marriage upon the will of a man before and since the 1 Vict. c. 26.

Before this Act, marriage of a testator and birth of a child generally amounted to an implied revocation. Now, by sect. 18 of the Wills Act, it is expressly declared that every will shall be revoked by marriage except one made in exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her heir or personal representatives.

State the effect as to revocation by any conveyance or act done relating to the estate disposed of, not being in itself an act of revocation, subsequently to the execution of the will.

No alienation subsequent to the execution of the will will prevent its taking effect on any estate disposable by the testator at his death; so that if lands are sold, and re-acquired after the date of the will, they will pass under the original devise.

Will a mortgage in fee operate in law and equity as a revocation of a will made previously?

No; the devisee will take the estate, subject to the mortgage.

How may a revoked will or codicil be subsequently revived?

Only by re-execution, or by a codicil duly executed, showing an intention to revive it. And when any will or codicil which is partly revoked and afterwards wholly revoked is revived, such revival shall not extend to so much thereof as was revoked before the revocation of the whole, unless a contrary intention can be shown. (1 Vict. c. 26, s. 22.)

What effect has a codicil properly executed under the 7 Will. 4, and 1 Vict. 26, on a will made previously, which would have been good as the law then stood, but not so under this Act?

If the codicil clearly refers to the will, or if both the will and codicil are written on the same paper, the will will be rendered operative, though not properly executed.

Is a will made before a marriage, and consequently thereby revoked, revived by a codicil made after marriage giving legacies, but not referring to the will

otherwise than by the introductory words, "This is a codicil to my will"?

These introductory words, aided by parol evidence of extrinsic circumstances explaining the intention of the testator, would be sufficient to incorporate the will with the codicil, and render the latter operative.

What is the difference of construction between a deed and a will? and why is the difference made?

Wills are subject in a great measure to the same rules of interpretation as apply to deeds; but, as in making a will, a party is supposed to be *inops consilii*, there are many instances in which a more liberal construction is allowed, and the law will carry the intended limitations into effect, though the words used would be insufficient or improper in a deed. Thus, a fee may be devised without words of inheritance, and an estate tail without words of procreation.

When there are two clauses absolutely inconsistent with each other, which clause prevails, the first or the last? and is this rule the same in both deeds and wills, and if different, in what particular?

In a deed, the former clause prevails. In a will the general rule is that the latter clause shall prevail, as implying a change in the testator's mind.

Suppose before the Act. 1, Vict. c. 26, a house was devised to the use of A. and his heirs upon trust for B., and in a deed a limitation in the same words. What estates do A. and B. respectively take under the deed and will?

Under the deed A. takes a legal estate in fee-simple, and B. an equitable estate for life. Under the will, A. takes a legal, and B. an equitable estate in fee-simple; for in such a case the *cestui que trust* takes an equitable interest co-extensive with the legal estate of the trustee. And this is so whatever the date of the will.

Give in the most brief form of words a devise of a freehold estate, say Blackacre, in fee by A. to B. Are words of inheritance absolutely necessary? How may they be dispensed with?

“I devise my freehold estate, called Blackacre, to B. and his heirs.” Words of inheritance are not absolutely necessary in a will; for, by the Wills Act, a devise without such words is sufficient to pass the fee-simple, or other the whole estate of the testator, unless a contrary intention appears. But it is better to insert in wills the technical words indispensable in the case of deeds, so as to express with certainty the quantity of estate to be devised.

Will a fee-simple pass by will to the devisee without words of limitation? and, if it will pass, cite the authority for your answer. Would it be the same if the testator made his will in 1801, and died in 1857?

Since the Wills Act, a fee-simple will pass by will without words of limitation. The Act only applies to wills made after the 1st January, 1838, without reference to the date of the death of the testator.

In wills made before the Act 1 Vict. c. 26, mention

some of the expressions, not being words of limitation, which were held to confer a fee-simple.

If the words of the testator denoted the *quantum of interest* or property that the testator had in the lands devised, and not a *description* merely of the *specific estate or land* devised, then, although no words of limitation were added, the whole extent of that his interest passed by the gift. Thus a devise to one in *fee-simple*, or to one *for ever*, or to him and his assigns *for ever*, passed the fee-simple.

Devise to B. after the death of A. Does A. take any and what estate?

An heir-at-law cannot be disinherited, except by *necessary* implication (*i.e.*, an implication so strong as to exclude the possibility of testator's intention being otherwise). Thus, a devise to B. after the death of A. gives A. an estate for life, by necessary implication, if B. be the heir-at-law of the testator; for, unless he takes it, no one else can. But A. takes no estate if B. is not the heir-at-law, for the heir-at-law would then take until A.'s death. (*Gardner v. Sheldon*, L. C. Conv. 541.)

Suppose a testator to have devised his lands away from his eldest son, and to have directed by his will that his eldest son should not be his heir, would this declaration have any, and, if any, what effect? Give a reason for your answer.

No effect whatever; for the only event in which the heir could take anything would be by the death of

the devisee in the testator's lifetime, and consequent lapse of the devise; to this he is still entitled, notwithstanding such declaration, unless the lands are expressly devised to some third person, or there is a residuary devisee, for unless the heir take, no one else can.

Suppose a will to devise all the testator's real estate, and the testator, after executing his will, purchase or acquire a freehold estate, and do not subsequently re-execute his will, or make any devise of such estate, to whom upon his death will such after purchased, or acquired, estate descend?

To the devisee, under his will.

On what words or expressions in a will of real property, and on what other circumstances will depend the question whether or no real estate purchased after the date of the will passes under the devise in it?

Such after-acquired property will pass under the will, unless a contrary intention appears. Thus, where the words of a specific devise exclusively point to the period when the will is made, such a contrary intention would be sufficiently indicated.

A. by will bequeaths £10,000 to "the heirs of the late B.," who will take under this bequest, assuming that there is nothing in the context of the will to explain the words?

The person who is the heir of B. at the death of the testator will take the £10,000. For, even where the entire subject of the gift is personal, the words "heir"

or "heirs," if unexplained by the context, must be taken to be used in their proper sense.

A gentleman, a widower, having real and personal estate, makes his own will in these terms: "I give my real estate to my eldest son A. and his sons in succession for ever. I give my personal estate to my right heirs in equal shares as tenants in common." He dies, leaving three sons and two daughters. Give the construction of this will.

A. takes an estate in tail male in the real estate. As to the bequest of the personal estate, though the word "heirs" must, as a general rule, be taken to be used in its proper sense, here it would be construed to mean children, and the sons and daughters would take in equal shares.

What is the construction of the words "die without issue," in a devise or bequest of real or personal estate?

These words are construed to mean a want or failure of issue in the lifetime, or at the death of such person, and not an indefinite failure of issue, unless a contrary intention appears by reason of such person having a prior estate tail, or of a preceding gift being without (without any implication arising from such words) a limitation of an estate tail to such person or issue, or otherwise. (1 Vict. c. 26, s. 29.)

An estate, consisting partly of a freehold and partly of leasehold, is devised to A. for life, with remainder to B. for life, with remainder to the heirs of the body of A.

What interest does A. take in the freehold and leasehold respectively?

A. will take an estate tail in the freeholds (subject to B.'s life estate) under the rule in *Shelley's* case; and he will take the leaseholds absolutely, subject to the executory bequest to B. for life, in case he survive A.; for words conferring an estate tail in real estate give an absolute interest in personal estate. (*Leventhorpe v. Ashbie*, L. C. Conv. 763.)

If a will devises property to A. for life, with remainder to B. for life, with remainder to B.'s first and other sons successively in tail, and B. dies between the making of the will and the death of the testator, what effect would that death have on the devises, and how would the property go?

If B. leave a son surviving him, such son will take an estate tail in remainder expectant on A.'s life estate.

What is the effect of a bequest of residuary estate?

(1) "*To my friends and relations;*" (2) "*To my near relations;*" (3) "*To my nearest relations;*" (4) "*To my poor relations;*" and (5) "*To the most necessitous of my relations?*"

The word "relations," taken in its widest extent, embraces an almost illimitable range of objects, and unless some line were drawn the gift would be void for uncertainty. To avoid this, recourse is had to the Statute of Distributions; and it is held that a gift to relations applies to the person or persons who would by virtue of these statutes take the personal estate

under an intestacy, either as next of kin or by representation of next of kin; but such persons will take, not in the proportions assigned by the statute, but equally *per capita*.

This rule is not departed from on slight grounds; thus, a gift to "my friends and relations," to "my near relations," to "my poor relations," or to "the most necessitous of my relations," will in general be construed in the same way; but in the case of a gift "to my nearest relations," the next of kin will take to the exclusion of those who, under the statute, would have been entitled by representation.

If there be a bequest of the residue of personal estate to testator's wife for life, and afterwards to the relations of the testator, what person or persons will take under the description of relations?

A bequest to relations applies to the person or persons who would, by virtue of the Statute of Distributions, take the personal estate under an intestacy.

A. bequeaths a legacy to B. for life, and after his death to B.'s next of kin. B. dies, leaving a widow, a mother, and a sister; who is entitled to the legacy, and in what proportions, and why?

B.'s mother will take the whole legacy, in exclusion of both the widow and sister; because "next of kin," without reference to the Statute of Distributions, means the *nearest* of kin only, the one person of several next of kin who is the nearest related. A wife cannot take as *next of kin* to her husband.

What construction does the Court put upon the word "survivor" in a will? Is it ever construed to mean "other," and, if so, under what circumstances? Point out the distinctive force of the word "other" in the expression "survivor, or other of them."

The general rule is that, where unexplained by the context, the word "survivor" must be interpreted according to its natural meaning; but as this construction very commonly defeats the intention of testators, the Court has always shown a readiness to adopt a more liberal construction, and read the word as synonymous with "other." Thus, where it appears from the whole will that the testator intended the *other* should take, whether he was living at the time of the accruer or not; for instance, if lands are devised to two daughters in tail, and on the death of either without issue to the survivor in tail. If one die leaving issue, and then the other dies unmarried, the issue of the married daughter will be entitled, though she did not survive her sister. The jointure of the words "survivor" and "other" will of course forbid confining the bequest to those who literally survive.

Suppose an annuity is given by will to A. indefinitely, does he take it for life or in perpetuity?

For life only; for though a simple gift of personalty, or of the dividends or annual proceeds of a specified fund, passes the absolute interest to the legatee without words of limitation, yet where an annuity is so given, the annuitant takes only for life.

An annuity of £60 a year was bequeathed by a testator to his son F. out of certain stock, and the annuity was directed not to be sold until after F. and his wife's death, nor until F.'s son should attain twenty-one; was the annuity so given limited to F.'s life, or did he take a perpetual annuity by the bequest? Give the reasons for your answer.

This would be a perpetual annuity, for two reasons :

(1) Because when the will dedicates the *corpus* of a fund to the purchase of an annuity, it is a gift in perpetuity. And (2), where the will deals with an annuity as being in existence, and operative beyond the period of the life of him who is first to enjoy it, and no other period can be fixed for such duration short of making it perpetual, the annuity is considered in perpetuity.

If a testator gives an annuity, and directs a sufficient principal sum to be appropriated by his executors to purchase the annuity, but the intended annuitant demands the principal of the executors, can this demand be resisted, and, if not, what precautions should be taken in the will to prevent the possibility of this occurring?

If the purpose of the gift is the benefit solely of the donee himself, he can claim the principal, even in spite of the express declaration by the testator that he shall not be permitted to receive the money. (*Stokes v. Cheek*, 29 L. J. Ch. 922.) There should, therefore, be a provision in the will that, on any attempt to

assign or charge the annuity, it should cease, and fall into the residue.

Are there any cases in which the interest of a devisee or legatee does not lapse by their death in the lifetime of the testator? Give instances.

There is no lapse:—(1) in the case of a devise of real estate to any person in tail who leaves inheritable issue surviving testator: (2) in the case of a gift of an absolute or transmissible interest to a child, or other issue of the testator, who leaves issue surviving the testator: (3) in the case of gifts in joint tenancy to several, of whom one at least survives the testator.

A testator having three sons devised lands to his youngest son in fee; the youngest son died before the testator, leaving two daughters and no son. To whom, on the death of the testator, would the land go? State the reason for your answer.

To the two granddaughters of the testator as coparceners; for, in this case, there is no lapse; but the devise takes effect as though the youngest son had died immediately after the testator.

A testator leaves a legacy to his son and a legacy to his nephew; both die before the testator, leaving children. Do the legacies lapse? and, if not, to whom are they respectively payable?

The legacy to the son does not lapse, but is payable to his next of kin. The legacy to the nephew lapses, as he does not come within the exception to the general

rule, but will go to testator's next of kin, or residuary legatee.

Will a lapsed devise of real estate go to the residuary devisee of real estates, if any, or to the testator's heir?

Unless a contrary intention appears by the will, lapsed devises are included in the residuary devise (if any) contained in the will.

A., by will, devises his estate called Blackacre to B., and gives the residue of his real estate to C. B. dies in the testator's lifetime. To whom will Blackacre go?

To C., since the 1 Vict. c. 26 (s. 25).

A testator bequeaths the residue of his personal estate to several persons as tenants in common, one of the residuary legatees (not being a son or other issue of the testator) dies in the lifetime of the testator. What becomes of his share?

His share will lapse, and go to the next of kin, unless the bequest be made to a class, as to the children of A. in equal shares, in which case all who answer that description at the testator's decease will be entitled.

When will trust and mortgaged estates pass under a general devise, and when not?

By a devise in general terms a trust or mortgaged estate will pass, unless an intention to the contrary can be inferred from expressions in the will or the purposes or objects of the testator. Thus, if the testator charges his property devised generally with debts or legacies, or if he limits it to uses in strict settlement with remainders over, or for the separate use of

a married woman, the legal estate in trust or mortgaged estates will not pass. (*Lord Braybrooke v. Inskip*, L. C. Conv. 376.)

If lands are devised to a trustee, his heirs, and assigns, upon trust, that he or they sell the same, and no power of appointing a new trustee is given by the will, and the trustee by deed conveys the land to A., in order that he may execute the trust, can A., as assignee of the trustee do so? And if, instead of making the conveyance to A. the trustee has died, devising the trust estate to A., could A. then have executed the trust?

In the first case A. cannot, as assignee of the trustee under the deed of conveyance, execute the trust; for a trustee cannot by deed *inter vivos* alien his trust. But in the second case, where the trustee has died and devised his trust estate to A., he can execute the trust, for where the trusts are confided to a trustee "and his assigns," they may be legally performed by the devisee of the trustee. If the lands were vested in the trustee, *simpliciter* without any reference to his heirs or assigns, the devisee could not act as trustee, though the legal estate would be vested in him. (See notes to *Braybrooke v. Inskip*, L. C. Conv. 876.)

What is an executory devise?

It is such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. Thus a devise may be made of a freehold *in futuro*, or a fee upon a fee, both which limita-

tions would be void in a conveyance at common law.

Give three instances of an executory devise.

(1.) A devise of lands to A., an infant, and his heirs ; but in case A. should die under the age of twenty-one years, then to B., and his heirs.

(2.) Devise to A. for life, and after his decease and one year to B. in fee.

(3.) Devise to B. and his heirs, to take effect six months after the testator's death. In each of these cases B. has an executory interest.

If Blackacre were wished to be devised to B. in trust for two infant children in moities, but so that in case of the decease of one before the testator, the surviving child is to take the entirety, how is that to be accomplished ?

By devising it to trustees in trust for the two infant children and their heirs as tenants in common, with an executory devise over to the survivor and his heirs in case one of them should die before the testator. By this means they would be entitled to the estate in equal moieties, if both survived the testator, but if one died in his lifetime the survivor would take the whole under the cross executory limitation to him and his heirs.

Freeholds of inheritance are devised unto, and to the use of, A. and his heirs, but if he shall die without issue living at the time of his decease, to A.'s sisters in fee. What estates do A. and his sisters take respectively in such freeholds ?

Since the Wills Act, A. will take an estate in fee simple, subject to an executory devise over to his

sisters in the event of his dying without leaving issue at his death.

What is the difference between an executory devise and a shifting use?

An executory devise is a limitation of a future or executory interest by will; a shifting use is a similar limitation by a conveyance operating under the Statute of Uses. (See *ante*.)

State the difference between a remainder and an executory devise, and between an executory devise and a conditional limitation.

The principal differences between an executory devise and a remainder are—(1) a remainder may be limited in a conveyance at common law, an executory devise is admitted only in Wills; (2) a remainder is a future estate which depends upon and waits for the determination of a prior estate; an executory devise arises of its own inherent strength, and often puts an end to a prior estate; (3) a remainder must vest at the instant the preceding estate determines, an executory devise may arise at any time; (4) a remainder cannot be limited after an estate in fee-simple, an executory devise may. A conditional limitation is the same as a shifting use.

Within what time must it be provided that the contingencies of an executory devise shall happen?

Executory devises are subject to the rule against perpetuities. The time is reckoned from the death of the testator.

In case of a charge by will coming into operation since the Law of Property Act, 1859, of debts and legacies, who is clothed with power to raise money necessary for the purpose, and by what means?

Where a testator has made such a charge, and has devised the estate so charged to any trustees for the whole of his estate, and has made no express provision for raising such debts or legacies, such trustees may, notwithstanding any trusts actually declared, raise the same by sale or mortgage; but if the testator has not devised his whole estate to any trustees, the executors are to have the same powers.

On payment of purchase-money to trustees, what is to be attended to on the part of the purchaser? Is the purchaser of an estate, sold subject to a devise for payment of debts generally, bound to see to the application of the purchase-money?

It is now provided by 22 & 23 Vict., c. 35, s. 23, that the *bond fide* payment to, and receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application; and the 23 & 24 Vict., c. 145, s. 29, gives the like effect to the receipts in writing of a trustee for any money payable to him in exercise of any trust or power. Before the statute, the purchaser was bound to see to the application of his money when legacies or scheduled debts were charged, but not when debts generally

When lands are devised, charged with the payment of debts alone, or charged with debts and legacies together, or charged with legacies alone, can the devisee in either, and if in either, in which of these cases, make a good title to a purchaser, or a mortgagee, without his being obliged to look to the discharge of such debts and legacies ?

If legacies only are charged on the lands, the purchaser or mortgagee is bound to see his money duly applied in their payment ; if, however, the debts are charged, then, whether there be legacies also charged or not, the practical impossibility of obliging the purchaser or mortgagee to look to the payment of so uncertain a charge, exonerates him from all liability to do more than simply pay his money to the devisee on his sole receipt. This is in no way altered by the 22 & 23 Vict., c. 35, s. 14, as that section applies only to devises to *trustees*, and it is expressly provided that the provisions of the Act are not to apply to a devise to any person of the testator's whole estate charged with debts or legacies.

If real estate be devised to a trustee who is unwilling to act, and who has not acted, what is the usual and proper course to be taken by him ?

He should execute a deed of disclaimer.

What is the difference between a specific and a general legacy ? Give an instance of each.

A specific legacy is a bequest of a specific part of the testator's personal estate ; for instance, a bequest of

“the service of plate presented to me on, &c.” A general legacy is one not so distinguished, but is payable only out of the general assets, as a bequest of a mourning ring of the value of £10.

How should a legacy of stock in the funds be bequeathed so as to make it a specific and not a general legacy?

Some particular stock must be specified, thus a bequest of “£100 consols now standing in my name,” is a specific legacy, but a bequest of “£100 consols” merely is a general legacy.

What are the advantages of general over specific legacies, and what the disadvantages?

A general legacy is not liable to *ademption* by the act of the testator in his lifetime as a specific legacy is, but on the other hand it is liable to abatement in case of a deficiency of assets, while a specific legacy must not be sold for the payment of debts, until the general assets are exhausted.

State whether, in case of a deficiency of assets, specific legacies can be required to abate.

A specific legacy does not abate with the general legacies, but must be paid or retained by the executor in preference to those which are general, and must not be sold for the payment of debts until the general assets are exhausted.

Who are the proper parties to assign a lease of a deceased testator, who bequeathed it specifically, and why?

The legatee should convey with the executor's consent. The reason is that the personal property, including chattels real of the testator, vest in the executor from the moment of the decease, to be applied by him, first, in payment of the testator's debts, and then according to the directions of the will, and therefore property specifically bequeathed will not belong to the legatee until the executor has assented to the bequest.

What is a vested and what a contingent legacy?

A legacy is said to be *vested* when the interest or right of the legatee is so fixed as to be transmissible to his executor or administrator, even although he die before the time arrives for the payment of the money.

It is said to be *contingent* where it is given only on the happening of some contingency, and will be altogether extinguished by the death of the legatee before that period.

Portions given to arise out of lands to be paid at twenty-one, or marriage. The object dies under twenty-one without having been married, what becomes of the portion? The same question as to a legacy of personalty.

The portion to arise out of the land will not be raised for the benefit of the administrator of the deceased, but will sink into the land for the benefit of the inheritance, for as it is bequeathed to the legatee on an event *personal* to himself, it is presumed that the testator intended him to have it only on the happening

of that event. (*Lady Pawlett v. Lord Pawlett*, L. C. Conv. 720.)

A legacy of personal estate to be paid at twenty-one, is an interest vested so as to pass to the representatives of the legatee, if he die under age. (*Stapleton v. Cheales*, L. C. Conv. 724.)

A. by his will gives and bequeaths a legacy of £200 to B. (a stranger), and directs his executors to pay it on B.'s attaining twenty-one. B. dies under twenty-one, and after the death of A. Who is entitled to the legacy, and why?

In this case the legacy to B. is a vested legacy, it being *debitum in præsenti* though *solvendum in futuro*, it will therefore belong to his administrator on his death under twenty-one. (*Stapleton v. Cheales*, L. C., Conv., *supra*.)

In the absence of any express direction, how may an executor deal with a legacy given to a minor, so as to be free from responsibility?

The only way in which he can obtain a proper discharge is by paying it, after deducting legacy duty, into the Bank of England, with the privity of the Paymaster-General for the time being, on behalf of such infant.

What is the effect of the Statute of Limitations on a legacy?

That it cannot be recovered after the end of twenty years after a present right to receive it accrued to some person capable of giving a discharge for it, unless in

the mean time some part of the legacy or interest thereon has been paid, or some written acknowledgment of the right thereto given; only six years' arrears of interest on the legacy can be recovered.

What are assets?

Assets are all the property, real and personal, of a deceased person, which is chargeable with and applicable to the payment of his debts and legacies.

If a man dies seised of lands, are they liable as against his devisee, or heir-at-law, for the payment of his debts of both kinds, or either, and which?

By the 3 & 4 Will. 4, c. 104, real estate of a deceased not made subject to the payment of his debts is to be considered as assets to be administered in equity for payment of his debts, as well on simple contract as on specialty.

3 & 4 Will. 4, c. 104, renders freehold and copyhold estates liable to the payment of specialty and simple contract debts. Under the statute, are those legal or equitable assets, and is there any class of creditors entitled to be paid their debts before others?

They were equitable assets; but it was especially enacted that creditors by specialty in which the heirs were bound, should be paid in full before creditors by simple contract, or by specialty in which the heirs were not bound, were paid any part. Since the 32 & 33 Vict. c. 46, however, they will all participate equally.

A testator charges all his estate with the payment

of his debts; are creditors by simple contract by such will on a level with specialty creditors holding security when the heirs are bound?

Yes; in such a case the Court of Chancery allowed all creditors to participate equally, on the ground that "equality is equity." This was so before the 3 & 4 Will. 4, c. 104, and was not altered by that statute.

In what court or registry should a will of personality be proved, where the testator leaves bona notabilia in different districts?

Formerly, if the testator left *bona notabilia*, i.e., chattels to the value of a hundred shillings, in two distinct dioceses, then the will was to be proved before the Metropolitan of the province by way of special prerogative; hence the Archbishops' Courts were called Prerogative Courts. Now a will may be proved in London, or in the registry of the district where the deceased had at the time of his death a fixed place of abode, without reference to the locality in which the property of the deceased may be.

What was the position, legal and equitable, of an executor in respect of residue undisposed of by the will previously to the statute 11 Geo. 4, and 1 Will. 4, c. 40; and what alteration did the statute make?

Before this statute it was held that such undisposed of residue devolved to the executor's own use, but equity laid hold of any circumstance or expression in the will which would rebut the presumption of a gift to the executors, and held them to be trustees for the

next of kin. By that statute the executors are in all cases to be held to be trustees, unless a contrary intention appears.

A. by will appoints B. executor. B. dies, and by his will appoints C. executor. Does C. by accepting the office become the representative of A., and is he bound to administer A.'s estate?

Yes; C. by accepting office becomes the representative of A., and is bound to administer A.'s estate. An executor cannot renounce probate of the first will and take probate of the second.

Can one of several executors, or one of several administrators, assign leaseholds of his respective testator or intestate, or must they all concur? State any distinction, if it exists, and the reasons for it.

An assignment of leaseholds by one of several executors is good, but it is doubtful whether such an assignment by one of several administrators is also good. It has been said that executors and administrators stand in this respect, as in others, on the same footing, but the point is not conclusively settled.

What is an executor de son tort; and in what cases is a discharge given by him available against a claim brought by the legal representatives?

Where a stranger takes upon him to act in the affairs of the deceased without just authority, he is called an executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship without its advantages. All his lawful acts are good, and

therefore a discharge given by him in the rightful course of administration will be available as a defence against a claim brought by the legal representative.

When a sole or surviving executor dies intestate, how is a legal personal representative of the original testator constituted?

An administrator must be appointed to distribute, according to the will of the testator, such of his effects as were not distributed by the deceased executor. In such case the administration is called an administration *de bonis non administratis*.

If the will of A. is proved by his two executors, B. and C., then B. dies intestate, and then C. dies testate, but without naming executors, who will be the legal personal representative to A.?

Administration *de bonis non* must be taken out.

If a trustee of a term dies leaving an executor, who dies and leaves an executor, who is the representative of the trustee, and who if the executor dies intestate?

In the first case, the executor of the trustee's executor will be the trustee's representative, for the interest vested in an executor by the will of the deceased may be transmitted by the will of the same executor, but the administrator of the trustee's executor has no privity or relation to the trustee, and therefore in the second case an administrator *de bonis non* of the trustee must be appointed.

If A. dies leaving B., C. and D. his executors, and B. only proves his will, and dies, leaving C. and D.

him surviving, who will be the legal personal representative of A.?

C. and D. will be the legal personal representatives of A., and they or either of them can prove the will under the power reserved to them in the grant to B.; but if they renounce, administration *de bonis non* must be taken out to A., for, as B. dies, leaving C. and D. surviving, no interest in the executorship is transmissible to his own executor.

If the testator do not name any executor of his will, who would be entitled to probate?

Administration *cum testamento annexo* will be granted to the residuary legatee.

Define the difference between probate duty, legacy duty, and succession duty?

Probate duty is an *ad valorem* duty, payable in respect of the whole of the personal estate and effects of the testator in the United Kingdom, when the value of such estate exceeds £100. Legacy duty is payable on every legacy and every share of personal estate under an intestacy, when the value of the legacy or share amounts to £20. The rate varies according to the degree of relationship which the legatee bore to the deceased. Succession duty is payable on every succession (see *ante*, p. 273), and varies in the same way.

If a testator dies, leaving personal property in France, India, and Canada, and not transferable in England, are such assets liable to probate and legacy duty?

Probate duty is not payable in respect of property in a foreign country belonging to a testator dying in this country, although the property be brought into this country by the executor; but if the testator was a British subject domiciled here all his personal property wherever situate is liable to legacy duty.

Does a will executed (since the late Statute of Wills) in the presence of two witnesses pass real estate in the British colonies or any of them?

It passes real estate in such of the colonies only as have adopted the Wills Act; therefore where the testator has realty in the colonies it is generally advisable to execute the will in the presence of three witnesses, and introduce the word "published" in the attestation clause.

In regard to the Act of 1861, "To Amend the Law with respect to the Wills of Personal Estate made by British Subjects," in case of the will of a British subject made out of the United Kingdom, dying after that Act, by the rule of what country must the will be executed; and in that respect is there any and what option; and is or not the will of a British subject made in the United Kingdom affected by his domicile?

Every will made out of the United Kingdom by a British subject is, so far as regards personal estate, held well executed, whatever may be his domicile, if made according to the forms required; either (1) by the law of the place where made; or (2) the law of the place where the testator was domiciled when it was made,

or (3) the law then in force in that part of her Majesty's dominions where he had his domicil of origin (24 & 25 Vict. c. 114, s. 1); and every Will of personal estate made within the United Kingdom by a British subject is held to be well executed (whatever his domicil), provided it be executed according to the forms required by the laws then in force in that part of the kingdom where the will was made.

INTESTACIES.

What is the meaning of the term, dying intestate ?

It means dying without making a will.

In case of intestacy as to real estate, to whom will it descend ?

To the heir-at-law.

What do you understand by the legal maxim, nemo est hæres viventis ?

That no person can be the actual complete heir of another till the ancestor is dead.

What is the difference between an heir apparent and an heir presumptive ?

An heir apparent is one whose right of inheritance is indefeasible, provided he outlives his ancestor, as the eldest son; an heir presumptive is one who, if the ancestor should die immediately, would be his heir, but whose right may be defeated by the contingency of some nearer heir being born, as a brother or nephew

whose presumptive succession may be destroyed by the birth of a child.

What are the general rules as to the descent of freehold lands of inheritance ?

As altered by the 3 & 4 Will. 4, c. 106, the rules of descent may be thus stated :—

(1) In every case the descent shall be traced from the purchaser.

(2) Inheritances shall, in the first place, lineally descend to the issue of the purchaser *in infinitum*.

(3) Males are preferred to females, and an elder male to a younger ; but females (when there are several) take together.

(4) The issue of the children of the purchaser represent or take the place of their parents *in infinitum*, the children of the same parent being always subject (amongst each other) to the same law of inheritance as contained in the third rule.

(5) On failure of the issue of the purchaser, the inheritance shall descend to the nearest lineal ancestor then living in the preferable line, supposing no issue of a nearer deceased ancestor in that line to exist.

(6) Among the lineal ancestors of the purchaser, the paternal line (whether of the purchaser or of any ancestor, male or female) is always preferred to the maternal.

(7) Where an ancestor, to whom, if living at the purchaser's death, the inheritance would, according to the fifth rule, have descended, dies before the purchaser, leaving issue, the issue of such ancestor *in infinitum*

shall represent him, according to the same law of succession as before laid down with respect to the issue of the purchaser; but with this addition, that those related by the whole blood to the purchaser are preferred to those related by the half-blood.

(8) An eighth rule has now been added by the Stat. 22 & 23 Vic. c. 35, that where there is a total failure of heirs of the purchaser, the descent shall be traced from the person last entitled to the land as if he had been the purchaser thereof.

What are the chief alterations in the law of descent effected by the 3 & 4 Will. 4, c. 106.

- (1) It abolished the maxim *seisina facit stipitem*.
- (2) It allowed the inheritance to ascend; and
- (3) It let in the half-blood.

A. buys an estate and devises it to B., who survives A., and dies without issue and intestate, from whom is the descent to be traced, and why?

From B., the purchaser, as he is the person last entitled who did not take by descent. (Rule 1.)

State the law of primogeniture.

Primogeniture is the right of the eldest among males to inherit, in exclusion of the younger (Rule 3.)

A. dies intestate, seised in fee-simple, leaving one daughter (B.), a grandson by a deceased daughter (C.), a grandson and granddaughter by a deceased daughter (D.), a granddaughter by a deceased son (E.), and two granddaughters by a deceased daughter (F.); to whom will A.'s real estate descend?

The granddaughter of the deceased son (E.) will be entitled under Rules 3 & 4.

A. dies, leaving two granddaughters, the issue of a deceased daughter; a grandson, the issue of another deceased daughter, and two daughters; to whom will his estate in fee-simple descend?

To all of them as coparceners; the two granddaughters and the grandson being entitled to stand in the place of their deceased parents. (Rules 3 & 4.)

A. dies without issue, leaving a father and brother of the half-blood and a sister of the whole blood; upon whom would the estate have descended previous to the operation of the Inheritance Act, 3 & 4 Will. 4, c. 106, and upon whom would it descend subsequently to that period?

Before the Act, the estate would have descended to the sister of the whole blood, as under the old law the inheritance was not allowed to *ascend*, and the half-blood was excluded; now, however, the father will inherit under Rule 5.

A man seised in fee dies intestate and without issue, leaving a widow, a father, and an elder brother; who becomes entitled to his estate, and by what law?

Subject to the widow's dower, the father will be entitled under Rule 5.

A. dies seised of real estate, without issue, and intestate, leaving his grandfather and his (A.'s) mother,

and a brother and sister, him surviving; which of these is his heir?

His brother is his heir. (Rule 5.)

A man dies intestate, leaving a wife, a daughter of an aunt on his mother's side, and the son of an aunt on his father's side, his only relations; to whom would his real estate descend? Give the reason for your answer.

Subject to the widow's dower, it will descend to the son of the aunt on the father's side, under Rule 6.

Explain the doctrine of "possessio fratris."

If a father had a son, A., and a daughter, C., by one venter, and a son, B., by another venter, and died intestate, the lands descended to A., his eldest son. If A. entered, and then died seised without issue, B. could not by the old law inherit as heir to his half-brother, but the lands descended to C., his sister, the maxim being, *possessio fratris facit sororem esse hæredem*.

If A. had not entered, the descent would have been traced from the father, the person last seised; B. would then have inherited in exclusion of his half-sister; now, by the new Act, the descent is to be traced from the last purchaser.

Can persons of the half-blood inherit real estates by descent in any, and what case, and under what authority?

Under the Inheritance Act, a person of the half-blood is capable of being heir, and he will inherit next after a relation in the same degree of the whole blood

and his issue, when the common ancestor is a male ; and next after the common ancestor, when the common ancestor is a female ; so that a brother of the half-blood on the part of the father will inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half-blood on the part of the mother, will inherit next after the mother.

A. seised ex parte maternâ, makes a conveyance to the use of himself and his heirs ; what is the effect of this upon his estate ?

By conveyance the line of descent is broken, and A. becomes the purchaser ; on his death the descent will be traced from him ; and, in default of issue, his ancestors *ex parte paternâ* will inherit in preference to those *ex parte maternâ*. If no such conveyance had been made, the latter would have inherited in total exclusion of the former.

A. and B. (each being an only child) become separately possessed of land in fee-simple ; A. as heir-at-law of his mother, and B. under his mother's will. A. and B. both die intestate, each leaving a brother of his father and a brother of his mother surviving him? to whom will the lands of A. and B. respectively go ?

The lands of A. will go to the brother of his mother, for his mother is the purchaser, from whom the descent is to be traced, and consequently none of the relations on the father's side can inherit. The lands of B. go to the brother of his father, as B. is the purchaser, the line of descent being *broken* by the mother's will.

How will the personal estate of an intestate be distributed who dies leaving—

(1) *A wife and children.*

(2) *A widow, one child, the children of a deceased child, and a brother and sister.*

(3) *No children, but a widow, a brother, and children by another brother or sister.*

(4) *No widow or issue, but nephews, the children of a deceased brother or sister, and great nephews, the descendants of another deceased brother or sister.*

(5) *A deceased brother's daughter, and two grandchildren of a deceased sister.*

(6) *A mother, two brothers, and a sister.*

(7) *A mother, a brother, and two children of a deceased brother.*

(8) *A mother, mother-in-law, sister, sister-in-law, two nephews, sons of a deceased brother, and a posthumous brother of the half-blood.*

(1) *One-third to the widow, and the residue in equal proportions to the children.*

(2) *One-third to the widow, another to the child, and the remaining third to the grandchildren, as representatives of their parent.*

(3) *Half to the widow, and the residue to the brother, and the children of the deceased brother or sister, the latter taking *per stirpes*.*

(4) *The whole to the nephews; the grand-nephews being excluded, as no representatives are admitted*

among collaterals, farther than the children of the intestate's brothers and sisters.

(5) The whole to the deceased brother's daughter, for the same reason.

(6) The whole is divided among his mother, brothers, and sisters, equally.

(7) One-third to the mother, another to the brother, and the remaining third to the two children of the deceased brother.

(8) It will be divided into four equal parts, of which one will go to the mother, another to the sister, another to the two nephews, and the remaining fourth to the brother of the half-blood.

State when the next of kin take per stirpes and when per capita.

They claim *per stirpes* when they all claim in right of another person *jure representationis*, and *per capita* when they claim in their own right, as in equal degree of kindred.

Is there any, and, if any, what difference between the distributive share of an intestate's effects taken by brothers and sisters of the half-blood and whole blood?

Relations of the half-blood are entitled equally with the whole. They were formerly excluded from the inheritance of land for reasons purely feudal, which have nothing to do with personal estate.

A freeman of the City of London dies intestate, leaving a wife, two sons, and three children of a deceased son; how is the personal estate divided,

and how would it be divided under similar circumstances if the person dying were not a freeman of London?

The City of London had a peculiar custom of distributing intestates' effects, which was expressly excepted out of the Statute of Distributions; but this and all other such customs were abolished by the Statute 19 & 20 Vict. c. 94; therefore, the personal estate of the intestate, whether a freeman of the City or not, will be divided as follows: one-third to the wife, and the remainder to the two sons and three grandchildren, the latter taking *per stirpes*.

What rule is applicable to the succession or devolution of real or personal estate when the domicile is not English?

The succession to, or devolution of, real estate is governed by the *lex loci rei sitæ*; that to personal estate by the law of the domicile of the deceased owner.

How is the disposition of the personal estate of an intestate Englishman domiciled in France regulated?

By the French law.

What is the order in which next of kin are entitled to letters of administration?

Those nearest in degree to the intestate; therefore, in the first place, the children are entitled, being preferred to the parents, though in the same degree; the parents come next, then follow brothers and sisters,

and then grandfathers and grandmothers; for, though all these are in the second degree, the former are preferred; next to these are uncles and nephews, and the females of each class respectively; and, lastly, cousins.

If a man dies intestate, leaving a wife, mother-in-law, step-mother, a sister, a niece, daughter of a deceased brother, two nephews, sons of a deceased sister, and no other relations him surviving, who will be entitled to his real and personal estate, and in what proportions?

The real estate descends to the daughter of the deceased brother, subject to the widow's dower. The personal estate is divided as follows: one-half to the widow, and one-third of the other half to the sister, another to the niece, and the remaining third of such moiety to the two nephews.

If a man dies intestate, possessed, after payment of his debts, funeral and testamentary expenses, of—(1) railway bonds, (2) railway shares, (3) a king's share in the New River Company, (4) leaseholds for lives, (5) leaseholds for years, (6) a policy of £5000 on the life of another person, (7) copyholds of inheritance, and (8) a freehold house, leaving a widow and five sons and five daughters him surviving, upon whom will each of these several descriptions of property devolve, and in what proportions?

The railway bonds and shares (unless the latter are made realty by the Act of Incorporation), the lease-

holds for years, and the policy of assurance, are personal property; the widow, therefore, will take a third, and the children the remainder. The leaseholds for lives, if granted to the deceased and his heirs, will go to the eldest son as special occupant; but if not, they go to his administrator to be distributed as personal estate. The share in the New River Company is real estate, and therefore descends with the freehold house to the eldest son, as heir at law, subject as to the latter to the widow's dower; and the copyholds also descend to him, subject to any special custom.

COPYHOLDS.

What are copyhold estates, and their most common incidents or qualities?

Copyhold estates are estates holden by copy of Court Roll, at the will of the lord, and according to the custom of the manor to which they belong. As to the incidents of copyhold estate, in which it differs from freehold, see next answer.

State the differences between freehold and copyhold estates?

Copyholds differ from freeholds both as to the estate itself, and also as to its title or manner of acquisition.

First, as to the estate itself:

(1) A copyholder is merely tenant at will, though, as he is also tenant at will according to the custom—

that is, to hold in fee, or for life, he is considered as having a customary estate to that extent.

(2) There are no estates tail, and no curtesy or dower in copyholds, except by particular custom.

(3) The tenant, being merely tenant at will, cannot commit waste.

(4) He cannot lease his lands for more than a year without the lord's licence.

(5) He is liable to forfeiture, both for waste and on alienation for more than a year, and also on refusal to perform the proper services.

(6) He is subject to fines on every descent and alienation of his estate, and to heriots; which latter, however, are sometimes payable by freeholders.

Secondly,—They differ as to their title, or manner of acquisition; copyholds being alienated, *inter vivos*, by surrender and admittance; and, in the case of the decease of the tenant, his heir or devisee must be admitted to perfect his estate.

To whom, in the absence of any special custom to the contrary, belong the timber and minerals upon and under the waste land of a copyhold manor; and to whom the timber and minerals under copyhold lands?

To the lord in each case: but the lord cannot enter on the land of the copyholder to take the timber or minerals to his own use without the consent of the copyholder.

What leases can a copyhold tenant make?

For one year only ; a demise for a longer term is a cause of forfeiture.

What is a heriot ? claimable by whom, from whom, and when ?

Heriots are a tribute to the lord of the manor, due either from the free or from the copyhold tenant, usually the latter. They accrue either in respect of death or alienation, but more ordinarily in respect of death. It is sometimes the best beast, sometimes the best inanimate good of the tenant, but it is always a personal chattel. It is no charge upon the lands, but merely on the goods and chattels.

What is the meaning of "copyhold fine arbitrary," as descriptive of the tenure of Blackacre, and what is the practical effect of such tenure ?

This means that Blackacre is of copyhold tenure, and that the fine due to the lord on descent or alienation is arbitrary, i.e., at the will of the lord, and not fixed by custom. Practically, however, the fine would be limited to two years improved value, as in no case is a fine of greater amount allowed to be taken.

If copyholds are devised to three trustees, how is the fine on their admittance calculated ?

Trustees being joint tenants, pay a single fine for all, and the fine would be calculated thus : two years' value for the first life, half of that on the second, and half of that sum on the third.

What is freebench, and how does it arise ?

Freebench is the interest to which the wife is

entitled in the copyhold lands of her husband after his decease. It generally consists of a life interest in one-third, though sometimes in the entirety. It can only arise by special custom.

What is the distinction between freebench and dower ?

Freebench differs from dower chiefly in this, that dower attached to all freehold lands of inheritance of which the husband was solely seised at any time during the coverture ; but freebench does not usually attach until the actual decease of the husband, and was therefore no bar to a free alienation by him.

A. having married after the Dower Act (3 & 4 Will. 4, c. 105), purchased and was duly admitted to copyhold lands, and by a deed executed by him, declared that his widow should not be entitled to dower out of such copyhold lands ; will the widow be barred of her customary dower out of such copyhold lands by such deed ?

The Dower Act does not extend to copyholds ; his widow, therefore, will not be barred of her freebench.

By what assurance or assurances does a copyholder pass his estate to a purchaser or mortgagee ; and is there any, and what, difference in the form of assurance to a purchaser or mortgagee ?

A copyholder passes his estate to a purchaser by a surrender of his estate to the lord, and an admittance or grant by the latter, *de novo*, to the purchaser. By

the surrender, no estate is vested in the surrenderee as copyhold *tenant*, his title is not perfected until admittance. In the case of a mortgagee, the surrender is made upon condition that the money remains unpaid at the time appointed. If the money be paid, the surrender not being perfected by admittance, is void, without further ceremony. The mortgagee is not admitted unless he wish to take possession; but the conditional surrender constitutes the only security; when the mortgage is satisfied, entry thereof is made on the Court Rolls.

A., being a surrenderee of copyhold estate, but not admitted, assigns his interest to B; is the lord compellable to admit B.. on payment of a single fine? and how would the case stand, if, instead of a surrender to A., there had only been a covenant to surrender?

A surrenderee cannot transfer the benefit of the surrender so as to give the transferee a right to admittance. A. therefore must be admitted and then surrender to B., who can then compel admittance. But a double fine will be payable, as there are two admittances. If, however, there had only been a covenant to surrender and no actual surrender to A., he could assign his equitable interest under such covenant to B., who could thereupon compel the covenantor to surrender to him, and then obtain admittance on such surrender. Only one fine would be payable, as there would only be one admittance.

Describe how customary freeholds are conveyed inter vivos.

In some instances by deed of bargain and sale, in others by deed of grant instead of surrender; admittance is, however, necessary.

What is requisite to be done by a devisee of copyhold to complete his title?

The devisee must be admitted, and pay his fine to the lord. Formerly, presentation of the will at the next court was required, but now the mere delivery of a copy of the will to the steward is sufficient to authorise its entry on the rolls.

A devisee of copyhold estate dies without being admitted; will a devise by him operate to pass it, and under what authority?

By the 1 Vict. c. 26, s. 3, all the real estate of the testator may be devised, and under that description all his copyholds, though he should not have been admitted to them himself, are expressly included.

Is there any mode by which a testator, seised of copyhold estate, and intending that it should be sold after his decease, can avoid the necessity of the admittance of the trustees of his will, and the payment of a fine by them, before a sale can be effected; and if so, how?

Yes; the testator should by his will direct his executors to sell his copyhold estates. Such a direction gives the executors only a power and no estate, and there is no occasion, therefore, for them to be

admitted; the purchaser from them, provided the lands are sold before the lord has time to seize the land *quousque*, will alone require admittance by virtue of his executory estate which arose on the sale. So, if the testator devise his copyholds to such uses as his trustees should appoint, and subject thereto to the use of his trustees and their heirs with a direction to sell, the trustees can make a good title without being admitted, even though the lord has, in the meantime, seised the land *quousque*.

Can copyholds be entailed; and by what means?

It is only by a particular custom that copyholds can be entailed, for the statute *de donis* does not extend to lands of this tenure; a limitation, therefore, to a man and "the heirs of his body," in a copyhold will, ordinarily, and in the absence of a custom to entail, create not an estate tail, but a fee-simple conditional at Common Law.

State the mode of barring legal and equitable estates tail in copyhold lands, and the mode in which the protector of a settlement may give his consent to a copyholder barring his estate tail, whether legal or equitable.

Formerly, estates tail in copyholds were barred by customary recovery, or a forfeiture and re-grant; but since the Fines and Recoveries Act, a legal estate tail may be barred by a surrender, which requires no enrollment otherwise than by an entry on the Court Rolls. An equitable estate tail may be barred by sur-

render, in the same way as if the estate were legal; or by deed, in the same manner as if the lands were freehold. The deed must be entered on the Court Rolls, and need not be enrolled in the Supreme Court. The protector may consent by deed, to be executed either on or before the day on which the surrender is made, or the deed barring the entail is executed and entered on the rolls, or he may concur in the surrender; in which case the entry of the surrender must expressly state that such consent is given.

Give the mode of creating and transferring equitable interests in copyholds on sale or mortgage?

The Statutes of Uses relates exclusively to freehold, not to copyhold, as the legal seisin is in the lord. But if a surrender be made by one person to the use of another, upon trust for a third, the court will compel the surrenderee to perform the trust, as in the case of freeholds. The surrenderee is admitted and is the legal copyhold tenant of the lord, but he must account for the rents and profits to his *cestui que trust*. Such an equitable estate cannot pass by surrender, as the *cestui que trust* is not the legal tenant; but it may be transferred by any ordinary mode sufficient to pass an equitable interest in other cases. An equitable estate tail, however, may be barred by surrender, as before explained; and husband and wife may by surrender dispose of the wife's equitable estate, in the same way as if it were legal.

If copyholds were devised to a trustee upon trust for

A. for life, and after his death to B. absolutely, and B. should sell his remainder, by what assurance should the property be conveyed to a purchaser, the trustee having been admitted?

B.'s estate being merely equitable, the proper mode of assurance is by deed of assignment, as explained in the last answer.

How can a married woman convey her copyhold estates? Distinguish as to the legal and equitable estate therein?

The legal estate in the copyhold lands of a married woman may be conveyed by surrender by her husband and herself, she being on such surrender separately examined as to her free consent by the steward or his deputy. Her equitable estate may be conveyed in the same way, but more properly by deed, executed by her with her husband's concurrence, and acknowledged in the same way as if the lands were freehold. Such a deed need not be entered on the Court Rolls.

A person having no right in a copyhold is admitted tenant by the lord: what, if any, act by the person having the right will perfect the title of the person admitted?

A release of his right by the person entitled thereto to the tenant in possession by a wrongful title is a good extinguishment of such right, and is all that is required to perfect the title of such wrongful tenant.

Can the lord "approve" part of the waste lands of the manor, and, if so, under what law, and to what extent, and subject to what restrictions, if any?

Under the Statute of Merton (20 Hen. 3, c. 4) the lord of a manor may inclose or "approve" against common of pasture, though not in general against common of herbarry or estovers, so much of the wastes as he pleases for tillage or wood grounds, provided he leaves common sufficient for such as are entitled thereto.

Of what tenure will an allotment under an Inclosure Act made in respect of copyhold estate, be, supposing the Act to be silent in this respect?

Freehold, as an allotment made under an Inclosure Act to the owner of a copyhold estate, in respect of his right of common, will not be of copyhold tenure unless so provided in the Act.

Can a Court of Equity make a decree for partition of copyhold estate as of freehold, and under what authority?

Yes; by the Copyhold Act, 1841, a Court of Equity could, and the first division of the Supreme Court can now make the like decree for partition of copyhold or customary lands, as could then be made of freeholds. (4 & 5 Vict. c. 35 s. 85.)

Explain in a familiar manner the service rendered in respect of copyholds, and to whom; and the reasons for the general discontinuance and commutation of such services into money payments?

The services were rendered to the lord of the manor, and consisted of the following: the oath of fealty, together with suit to the customary court; rents, though

generally of a small amount; heriots due on the death of a tenant, and sometimes a relief payable by his heir; fines due on a change of tenancy, and such other services as were due by special custom. The lord was also entitled to the timber and minerals of the copyhold land. The reasons for the discontinuance and commutation of such services and rights into money payments were, that they were found productive of considerable inconvenience to copyhold tenants, without any sufficient corresponding advantage to the lord.

Can the lord of a copyhold manor be compelled to enfranchise? If so, in what case, and by whom; and how are the expenses of the enfranchisement borne?

By the Copyhold Act, 1852, the enfranchisement of copyhold is compulsory at the instance either of the tenant or of the lord, if the tenant were admitted after the 1st July, 1853. If the tenant were admitted before that date, the tenant can require enfranchisement, only on payment of such a fine as would be due on admittance, and two-thirds of the steward's fees. The expenses of the enfranchisement are borne by the party who required the same, and may be charged on the manor or the land enfranchised.

INCORPOREAL HEREDITAMENTS.

What are incorporeal hereditaments? And state the several sorts.

An incorporeal hereditament is any possession or subject of property, whether real or personal, capable of being transmitted to heirs, and not the object of bodily senses. In effect, however, it is exclusively applied to things *real*, and is a right annexed to, or issuing out of, or exercisable within, a corporeal hereditament *real*. They consist for the most part of rights *in alieno solo*; and these are generally distributable into *profits*, such as the right to feed cattle or take fish; and *easements*, tending rather to the convenience than the profit of the claimant, such as a right of way.

They are also divided into *appendant*, *appurtenant*, and *in gross*.

How are corporeal and incorporeal hereditaments respectively conveyed?

Since the 8 & 9 Vict. c. 106, by deed of grant. Formerly, *corporeal* hereditaments were said to lie in *livery*, and incorporeal *in grant*.

State concisely the meaning of the terms intercommon and common of estovers.

Intercommon, or common *pur cause de vicinage*, arises by prescription, where two commons adjoin each other, and the persons having a right of pasturage only over one of the commons allow their cattle to range indiscriminately over both. *Common of estovers* is the right of cutting wood from the forests or wastes of another for the use or furniture of a house or farm. It is claimed by prescription or grant.

When lands adjoin a river, to whom does the soil of the river presumptively belong ; and does it make any difference whether the river be a tidal one or no ?

In private rivers (*i.e.*, those not navigable) the soil of one half of the river to the middle of the stream belongs to the owner of the adjoining lands. In public rivers (as far, at least, as the tide flows) the bed appertains *prima facie* to the Crown.

In whom is the ownership of the seashore below high water-mark vested as a general rule, and what exceptions may there be to such rule ?

Presumptively in the Crown ; but grants of parts of the seashore have frequently been made to subjects, and such grants may be presumed by proof of long-continued and uninterrupted acts of ownership.

What is a rent-charge, and how created ?

A rent-charge arises where a man by deed grants, out of the land whereof he is seised, a certain rent payable to another, or makes over to another his whole estate in fee simple, with a certain rent payable thereout, with the addition of a clause of distress. A rent-charge, being an incorporeal hereditament, can only be created by deed or will.

May a rent-charge be granted in fee, or limited by way of use ? Is it necessary or usual to give a power of distress ?

A rent-charge, being a separate incorporeal hereditament, may be granted in fee, either by a grant at common law, or by a conveyance operating under the

Statute of Uses. A power of distress is nearly always given ; if no such power, the rent is called a *rent-seck*.

What is a rent-seck ?

A rent-seck (*redditus siccus*), a dry or barren rent, is where the owner has neither seignory nor reversion (as in the case of rent-service), nor any such express power of distress as mentioned in the last answer. No distress could formerly be made for it ; but now the 4 Geo. 2, c. 28, s. 5, gives a remedy by distress for rent-seck, in the same manner as rent reserved upon lease.

How does the rent that is reserved in a lease differ from a rent-charge ?

The former, called a rent-service, accrues in connection with *tenure*, usually attended by fealty and other services. To it the common law attached, as of common right, the power of distress. A rent-charge has no connection with fealty, the owner having neither seignory nor reversion, and no power of distress, unless expressly given.

What change has recently been made in the law with reference to a release from a rent-charge or judgment, and how and when was such change made ?

By 22 & 23 Vict. c. 35, a release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall only bar the right to recover any part of it out of the hereditaments released. Before this Act, a rent-charge was, in effect, extinguished by a release of part of the hereditaments.

So, by sect. 11 of the above Act, a release from a judgment of a part of the hereditaments charged shall not affect the hereditaments remaining unreleased.

What is the effect of the purchase of any part of the land charged with a rent-charge by the owner of the rent-charge?

It will operate as a virtual release of the whole, a rent-charge being regarded as a thing entire and indivisible, and not like rent-service, capable of apportionment. This is so, notwithstanding the statute mentioned in the last answer.

State the chief differences between an income derived from rent and from interest on money lent on mortgage.

The chief differences between them may be stated as follows :—Rent follows the nature of the property from which it issues, and is real estate. Interest follows the nature of the debt in respect of which it is payable, and is personal estate. Rent, therefore, goes to the heir; interest, to the personal representatives. For the non-payment of rent, the remedy is by distress and action; for the non-payment of interest, by action only. Interest has always been considered as accruing *de die in diem*, and apportionable in respect of time accordingly. Rent was by the common law regarded as entire and indivisible, and not apportionable. Since the Apportionment Act, 1870, however, there is no difference between them in this respect. (See Lynch's Stat. Law, 1870.)

Define an easement, and give examples.

It is a right which the owner of one tenement, called the *dominant* tenement, has over another, called the *servient* tenement, to compel the owner thereof to permit to be done, or to refrain from doing, something on such tenement for the advantage of the former. It is either an *affirmative* easement, *i.e.*, where the owner of the servient tenement must permit some act to be done by the owner of the dominant tenement, as in the case of a right of way; or *negative*, where he must refrain from doing some act, as not to obstruct light or air.

Can a right of way be conveyed; and, if so, how?

A right of way being an incorporeal hereditament can be conveyed by grant at common law, or by conveyance under the Statute of Uses.

Can a parol lease be granted for any period of the right of sporting over an estate?

No; a right of sporting over an estate is an incorporeal hereditament; and a lease of incorporeal hereditaments is, and always was, required to be by deed.

How may easements, such as rights of way, or of drains, or of water, be created de novo, and how acquired by prescription?

They are acquired *de novo*, either by *express grant*, which must be by deed; or by *implied grant*, as in the case of the severance by the owner of a tenement into two or more parts: Thus, where the owner of two tenements sells one, a grant will be implied of those apparent

and continuous easements, which during the unity of possession were enjoyed under the title of ownership.

By prescription they are acquired by showing an enjoyment, which must be peaceable, without interruption, and as of right, for the periods limited by 2 & 3 Will. 4, c. 71; before that Act, by showing such enjoyment from time out of mind. (*Sury v. Pigot*, L. C. Conv.)

State the periods of the statutable limitation of time for enforcing claims on land after the right accrued; in case of rights of common, right of way and of water, and right to the use of light, respectively?

By 2 & 3 Will. 4, c. 71, it is enacted that, where there has been an uninterrupted enjoyment of a right of *common* for thirty years next after the right of action accrued, the prescriptive right is not to be defeated by showing only that the enjoyment commenced at a period subsequent to the era of legal memory. The time during which the adverse party is under disability, or tenant for life, or during which an action is pending, is excluded. After sixty years the claim is indefeasible. In the case of *way* and other easements, and waters, the periods are twenty years and forty years. And an uninterrupted enjoyment of *lights* for twenty years gives an absolute and indefeasible right to them, unless the enjoyment took place under some instrument in writing.

Of what do great and small tithes consist; and what is a modus, and what a tithe rent-charge?

Great tithes generally comprise corn, hay, and wood; small tithes consist of all *mixed* tithes, *i.e.*, of wool, milk, and pigs, &c.; and *personal* tithes, as of manual occupations, trades, fisheries, and the like. A *modus* (*decimanda*) is a particular manner of tithing, which is allowed by immemorial usage, different from the payment of one-tenth of the annual increase. A tithe rent-charge is an annual payment in lieu of tithes created under the Tithe Commutation Acts.

Is a rent-charge payable to the rector or vicar under the Tithe Commutation Act fixed, or does it vary; and if it varies, how is the amount to be ascertained?

It varies with the price of corn. The amount is ascertained by the advertisement inserted every year, under the authority of the Board of Trade, in the *London Gazette*, stating the average price of corn for the preceding seven years.

A testator seised in fee of lands, and also of the tithes of them, devises the lands without expressly including, or showing his intention to include, the tithes. Will the latter pass to the devisee of the land?

They will not; as they are a distinct subject of property from the lands out of which they issue.

What will be the effect as regards merger of subjecting a tithe rent-charge by a settlement to the same limitations as the land out of which it issues, and is any one who may be entitled under such settlement able to control such effect?

No effect; as tithes are a distinct inheritance from

the lands out of which they issue. By the late Acts, however, whenever the tithe rent-charge and the lands are settled to the same uses, any person seised in possession of an estate for life in both, is enabled, by deed or declaration under seal, confirmed by the Commissioners, to merge the tithe rent-charge in the inheritance of the land.

What is an advowson? and how may it be acquired, and what right does it confer on the owner?

An advowson is the perpetual right of presentation to a rectory, vicarage, or other ecclesiastical benefice. It may be acquired in the same way as other incorporeal hereditaments, by purchase and descent; and also by building a church, and endowing it. The owner is called *patron* of the benefice, and, as such, has no interest in the glebe or tithe, but merely a right of nomination from time to time, as the living becomes vacant.

How are advowsons severally denominated?

Advowsons are of three kinds—*presentative*, *donative*, and *collative*. They may also be either *appendant*, when attached to a manor or other corporeal hereditaments; or *in gross*, i.e., subsisting by themselves, or belonging to a person, and not to a manor, &c. (Notes to *Fox v. Chester*, L. C. Conv. 190.)

On the appointment of a fit clerk to a living, state generally what forms must be gone through in the case of an advowson presentative, and of an advowson donative.

In the case of an advowson presentative, the patron presents to the bishop some duly qualified clerk, whom the bishop is bound to institute to the benefice, and cause him to be inducted into it. In the case of an advowson donative, the patron's mere deed of donation is alone sufficient.

An owner in fee of an advowson having presented to the living, dies intestate, leaving a son, A., and a daughter, B., by his first wife, and a son, C., by his second wife. A. dies intestate, and afterwards the incumbent dies; who is entitled to the advowson, and why?

Advowsons are descendible in the same way as freeholds of inheritance. The descent is, therefore, to be traced from the *purchaser*; in this case, A.'s father. On the death of A., therefore, without issue and intestate, C., his half-brother, will become entitled. Before the Inheritance Act the descent was traced from the person who last exercised the right of presentation. (Notes to *Fox v. Chester*, *supra*.)

If an advowson descends to coparceners, how and by whom is the presentation to a living to be made?

If the sisters cannot agree, they must present in turn, according to seniority; the eldest sister has the first presentation, and this privilege descends to her issue, or her husband, if tenant by the curtesy, or to her assigns.

If two or more persons are seised of an advowson as joint tenants, how and by whom is the presentation to be made?

Joint tenants must concur in a presentation, but if they present different clerks, the bishop may admit either, or refuse both; in the latter case, unless the joint tenants concur within six months, the bishop may present by lapse. There may, however, be a partition to present in turns.

An advowson is mortgaged in fee, the incumbent dies; who has a right to present, the mortgagor or mortgagee? Give the reason why the right of presentation is in the one or the other.

A mortgagee of an advowson is, until sale or foreclosure, in the nature of a trustee for the mortgagor, and must therefore present the nominee of the mortgagor, even although there be an express agreement that the mortgagee shall present.

A. is seised in fee of an advowson, the incumbent dies, then A. dies, without having presented to the living; who, on A.'s death, is entitled to present?

The personal representative of A., not his heir; for if the patron dies after a vacancy has happened, and before it is filled up, the right to present for the then next turn (being, as it were, a fruit fallen) is considered as personal, and not real, estate.

In what cases, and in favour of what persons, are covenants to resign a living legal?

By 9 Geo. 4, c. 94, a covenant to resign a living in favour of some one nominee, or one of two nominees, is valid, provided (1) that where there are two nominees, each of them shall be, either by blood or

marriage, an uncle, son, grandson, brother, nephew, or grandnephew of the patron ; (2) that the writing shall be deposited, within two months after execution, with the Registrar of the Diocese, and be open to public inspection ; (3) that the resignation made in pursuance of such engagement shall be followed by a presentation, within six months, of the person therein named.

May an advowson be aliened for any estate, and may the next presentation, or any number of presentations, be granted away ; and if the grantee of the next presentation does not dispose of it in his lifetime, or by will, in whom will it vest ? Can the right of presentation to a church that is void be by any means aliened ?

An advowson may be aliened for any estate, and the next, or any number of presentations may be granted away. If the grantee of the next presentation dies intestate, it will, being a chattel real only, vest in his administrator.

The next presentation cannot be aliened during a vacancy, as such a sale would be void as simoniacal.

Can an advowson, or an ecclesiastical benefice, be charged, and, if so, how ?

An advowson may be mortgaged by the patron in the same way as any other real estate, viz., by a deed of grant, subject to redemption.

As to charges on an ecclesiastical benefice (see *ante*).

State generally the law of simony.

Simony is the corrupt presentation of any person to an ecclesiastical benefice for money, gift, or reward; so called from the resemblance it is said to bear to the sin of Simon Magus.

By a Statute of Elizabeth, on such a presentation, both the giver and taker forfeit two years' value of the benefice, one moiety to the Crown, and the other to any one who will sue for the same; the presentation is also void, and the presentee is thereby rendered incapable of enjoying the same benefice, and the right of presentation is vested *pro hac vice* in the Crown. And by a Statute of Anne, if any person, for money or reward, procure the next presentation to any benefice, and present himself, he is guilty of simony, and the presentation lapses to the Crown.

A. purchases an advowson, and on avoidance presents himself. A. purchases a next presentation, and on avoidance presents himself. Will either presentation be simoniacal?

A. may purchase an advowson, and present himself, without being guilty of simony, as the Statute of Anne, above referred to, does not apply to the purchase of an entire advowson, only to the next presentation. If A. purchase a next presentation, and present himself, it is direct and palpable simony.

HUSBAND AND WIFE.

What are the rights of a husband with respect to his wife's freehold and copyhold estates?

All *Freeholds* of which the wife is seised at the time of the marriage or afterwards, are by law vested in the husband and wife during the coverture, in right of the wife. During their joint lives the husband is entitled to the profits, and has the sole control and management: but he cannot convey or charge the lands for any longer period than while his own interest continues except by way of lease for 21 years, under 19 and 20 Vict. c. 120. These rights of the husband, however, do not attach where the wife is entitled to the lands for her separate use, either under any express limitation to that effect in a deed or will, or where (if married after 1870) the lands descend upon her as heiress or coheiress of an intestate.

After the death of the wife, the husband may become solely seised for life as tenant by the curtesy—as to which, see *ante*. (Lynch's Stat. Law, 1870.)

The rights of the husband in the *Copyhold* lands of his wife are similar to the above, but depend on the particular custom of the manor.

When a woman seised of an estate of inheritance marries, who can properly grant leases thereof; and to whom should the rent be reserved, and with whom the covenants entered into?

By the 19 & 20 Vict. c. 120, any person entitled to the possession or receipt of the rents of any real estate in right of his wife who is seised in fee may grant leases thereof for 21 years, subject to the same conditions

as before detailed with respect to leases by tenants for life (s. 32). (See *ante*.)

The rent can be reserved to the husband, and the covenants entered into with him.

Suppose the husband to demise the wife's lands, and she survives her husband, what positive or contingent tenancy has the lessee?

If the lease were granted under 19 & 20 Vict. c. 120 (see last answer), it will be good against the wife, and all persons claiming under her. (S. 33). If not so granted, the wife may avoid it on the death of her husband.

What interest and power does the husband take in and over the following property of the wife; her personality in possession, her chattels real, her choses in action; and what effect has the death of husband or wife on this interest?

As to chattels real of which the woman is possessed at the time of the marriage, or which accrue to her during the coverture, the husband becomes possessed of them by the marriage in her right, and he is entitled not only to the profits and management of them, but he may also dispose of them as he pleases by any act during the coverture, and they are liable for his debts; and if he survive her, they are absolutely his. But he cannot in her lifetime bequeath them by will. And if he make no disposition of them before his death, and she survive him, they remain to her and do not go to his executors or administrators.

As to her *choses in action*, they do not become the husband's until he reduces them into possession ; and if he dies before this is done, they remain to his wife ; so, if she dies before he has reduced them into possession they form part of her estate, but he is entitled to obtain administration of her effects, and as her administrator become the owner of them.

The personal chattels of the wife become generally the absolute property of the husband.

Property to which she is entitled for her separate use under any instrument, or by virtue of the Married Woman's Property Act, 1870, in the case of wages and earnings acquired by her, and any property to which (if married after the Act) she becomes entitled as next-of-kin of any intestate, and any sum not exceeding £200 to which she becomes entitled under any deed or will, and the paraphernalia of the wife are exceptions to the above. (Lynch's Stat. Law, 1870.)

If a married woman is entitled to money secured by bond, and the husband dies in her lifetime before the amount due thereon is paid, who becomes entitled thereto ?

It remains to the wife, as money secured by bond is a chose in action. See last answer.

If a husband and wife mortgage the leasehold estate of the wife, to whom will the equity of redemption belong if the husband survive the wife, and to whom if the wife survive her husband ?

It will belong to the survivor in each case. A mort-

gage by the husband of his wife's chattels real does not defeat the wife's right of survivorship, even although the equity of redemption is reserved to the husband, unless there is something in the form of the deed which rebuts the ordinary presumption that it was intended only as a security. (See Dart V. & P. 916 *in notis.*)

What is the power of disposition given to the wife with concurrence of the husband over the wife's future or reversionary interest in personal estate by the Act affecting instruments made after 1857, and how to be exercised?

This Act empowers a married woman to dispose by deed of any reversionary interest in personal estate, whether vested or contingent, to which she becomes entitled under an instrument made after 31st December, 1857 (and which does not restrain her from so doing), with the exception only of an interest taken under her marriage settlement. Her husband must concur in the deed, and it must be duly acknowledged, as provided by 3 & 4 Will. 4, c. 74.

What powers has a husband over his wife's reversionary choses in action, or other reversionary interests in personal estate during coverture; and what are the rights of husband and wife in the distinctive event of each surviving?

The husband has no power to dispose thereof absolutely without his wife's concurrence. He can only assign the interest to which he may be entitled him-

self. If he survive the wife, he will, on taking out administration to her estate, become entitled to the property, or if he has assigned it, he will be bound by the assignment, and the assignee will take it. If the wife survive, she is absolutely entitled to the property, and no assignment by the husband alone can defeat this right. The husband and wife can together dispose of such property, as mentioned in the last answer.

Can a husband convey his wife's reversionary leaseholds for years with or without his wife, or her reversionary interest in personal chattels?

The husband has an absolute power to dispose of his wife's reversionary leaseholds for years without her consent. As to her reversionary interest in personal chattels, see last answer.

In what cases must the husband obtain letters of administration in order to obtain his wife's chattels, real or personal?

Where the wife dies in her husband's lifetime, her choses in action not reduced into possession by the husband during her life, and also her chattels real, which are not vested in his possession in her right in her lifetime, will form part of her personal estate; and the husband must take out administration to her effects before he can recover them.

Land is given to such uses as A., an unmarried woman, should appoint, and in default, to her in fee. Can a good title be made by A. after marriage with-

out the concurrence of the husband, or what further is necessary to complete the conveyance?

A married woman may exercise a power of appointment, without the consent of her husband, whether such power were given to her when married or single. If therefore the power to A. be valid and subsisting, she can make a good title without her husband's concurrence: but if the power should by any means have been suspended or extinguished, she can only convey her estate by deed acknowledged under the Fines and Recoveries Act.

If a power be reserved to a feme sole, as such, to dispose of her estate by deed or will, can she exercise such a power during coverture? State the proper mode of framing a power enabling her to do so in either case.

If a power be expressly reserved to a "feme sole" as such, or to a woman "being sole," it cannot be exercised by her during coverture. It should be expressly declared to be exercisable by her "whether covert or sole."

State the nature and principal incidents of "separate estate."

Separate estate is property, real or personal, which a married woman is entitled, in contemplation of equity, to hold for her sole and separate use. Its principal incidents are: (1) It is free from the debts and control of the husband: (2) It can be charged and conveyed by her at pleasure: (3) It is liable to her debts,

not only where she expressly charges her separate estate, but also for her *general* engagements, *e. g.* a bond by her: (4) It may be rendered inalienable during the coverture contrary to the general rule, invalidating all restrictions on alienation. (*Hulme v. Tenant*, 1 L. C. Eq. 435 and 2 St. C. 292.)

In case of the settlement of real property in fee to the separate use of a married woman without restraint on anticipation, what is the extent of her power of alienating or charging the same?

She has full power *in equity* to alienate or charge the property either by deed or will, without the consent or concurrence of her husband. (*Taylor v. Meads*, 12 L. T. Rep. N. S. 6.)

When real property is limited (not in contemplation of marriage) to the separate use of an unmarried woman, without power of anticipation, what are her rights in such property while she remains unmarried, and what are the rights of her husband in it, if she subsequently marries without a settlement?

While she remains unmarried, she has the absolute dominion over the property, and may dispose of it as she likes. Yet, if she do not dispose of it so as to put an end to the trust, and she marry without a settlement, the separate use clause and the restriction against alienation will be revived during such coverture.

What are a married woman's powers of disposition over personal estate settled to her separate use absolutely?

She has the same power of disposing of such separate property, by will or otherwise, as an unmarried woman would have, unless she is expressly restrained from alienation or anticipation.

If jewels or other personal chattels are given to the separate use of a married woman, but without naming a trustee, and the husband receives possession of them, is the wife protected on any, and, if any, what principle?

The wife is protected in equity, on the principle, that such articles are not to be reckoned amongst her paraphernalia, but are considered as given for her separate use; and, like other separate estate, are free from the control and debts of her husband, and may be disposed of by her at pleasure.

Where a life interest in money is limited to an unmarried female for life for her separate use, without power of anticipation, what are her powers over it while she remains unmarried; and what are the powers of her and her husband, or either of them, after marriage, without a settlement?

While she remains unmarried, she is not thereby deprived of the powers of alienation; she may therefore make such disposition or settlement of such income as she thinks proper; but should she marry without a settlement, the restraint on alienation will then attach, and during the coverture she will have no further power than that of receiving the income as it grows due. On her widowhood, however, her powers of

alienation will again revive : her husband has no power at all over the property ; as being settled to the separate use of the wife, it is altogether free from his control.

What is pin-money, and to what extent is it recoverable if the payment is in arrear ?

Pin-money is a sum payable by the husband to the wife in virtue of a particular engagement, to be applied by the wife in attiring her person in a manner suitable to the rank of her husband, and defraying other personal expenses. Only one year's arrears can be recovered by the wife, and no arrears by her representatives.

A. covenants by marriage settlement that he will within three years from the marriage settle real estate of the value of £10,000 upon certain trusts for the benefit of his intended wife, and the children of the marriage ; no particular estates are specified in the covenant ; at the time of the settlement A. had two real estates only, each worth £5000, which he afterwards conveyed to purchasers ; to one within, and to the other after, the expiration of three years ; the wife and a child of the marriage were living at the time of both the conveyances, and both the purchasers knew that fact, and were also aware of the covenant, and that A. had no other real estates. Has the wife or child any, and what, claim on the two estates, or on either and which of them ?

It is a general rule that if a settlor covenant to convey and settle lands without specifying any in parti-

cular, such covenant will not constitute a specific lien on his lands, and the covenantee will be deemed a creditor by specialty merely. The wife and children, therefore, in the case above will have no claim on the two estates, but are creditors by specialty only to the amount of £10,000.

If a married woman is appointed executrix of a will, what joint or separate powers have the executrix and her husband over the testator's estate?

If a married woman is appointed an executrix, she cannot accept the office without the consent of her husband, and having accepted it with his consent, she is unable, without his concurrence, to perform any act of administration which may be to his prejudice; whilst he, on the other hand, may release debts due to the deceased, or make assignment of deceased's personal estate, without his wife's concurrence; for as the general rule of law is that a husband and wife are but one person, the power, and with it the responsibility, are vested in the husband. Nevertheless, she may make a will, without her husband's consent, confined to the personal estate of which she is executrix, and the executor of her will, so made, will be the executor of the original testator.

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